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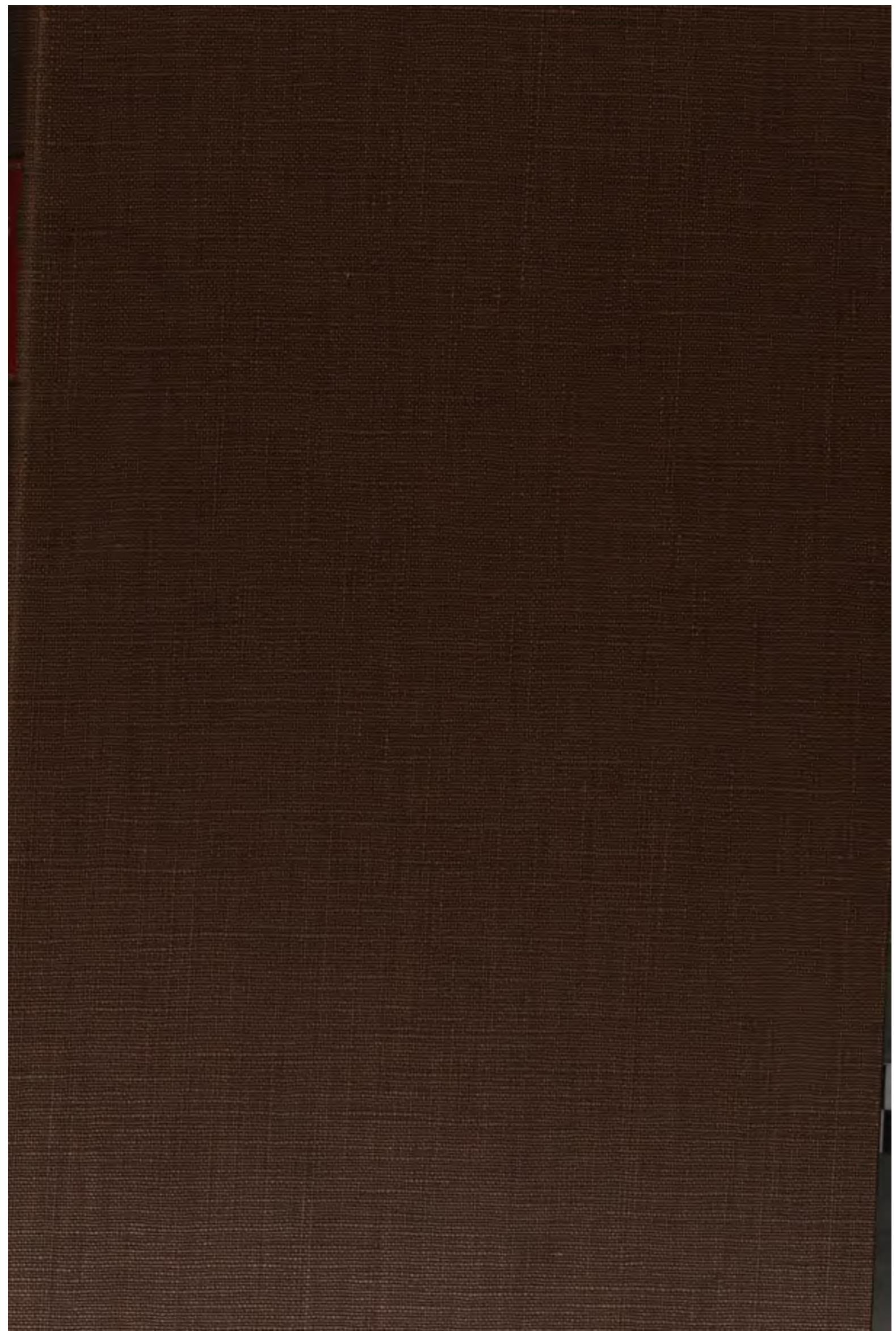
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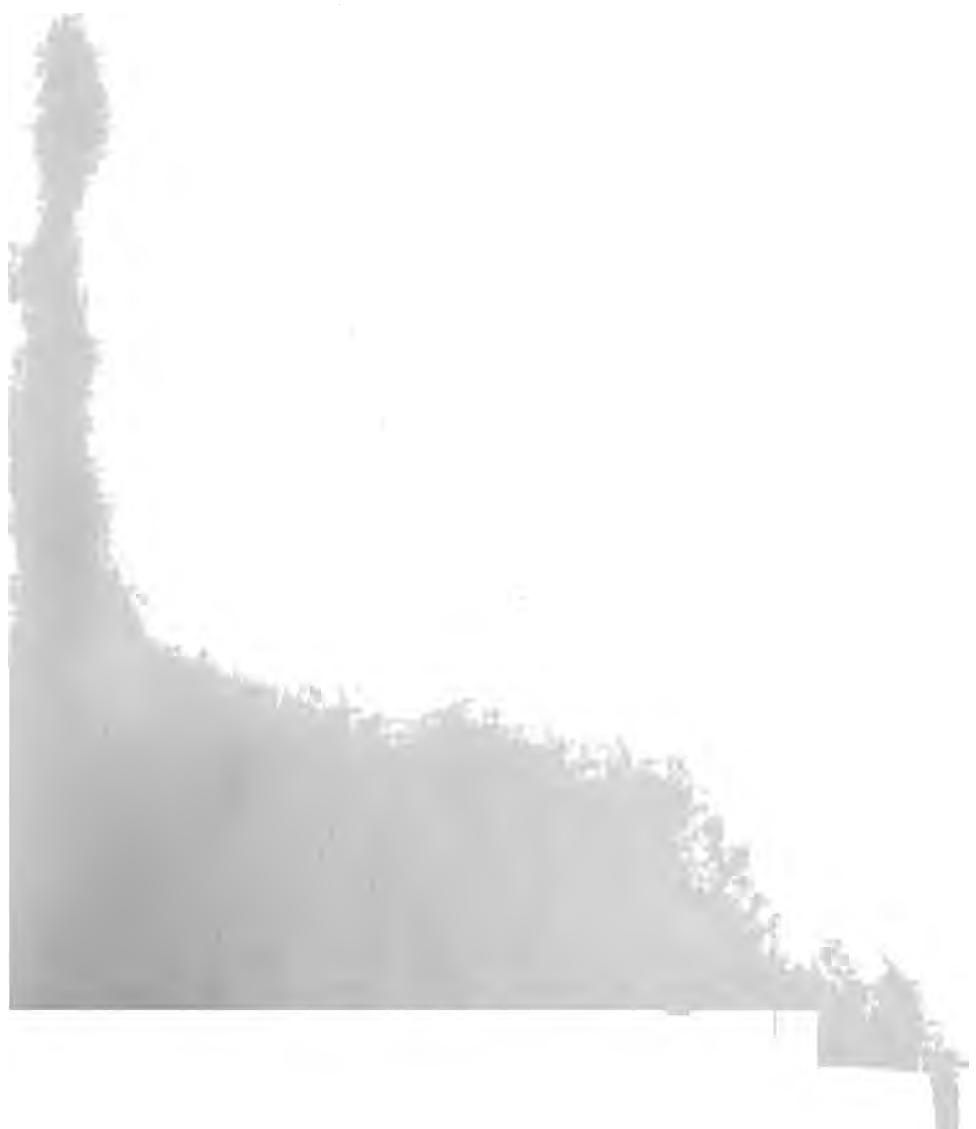




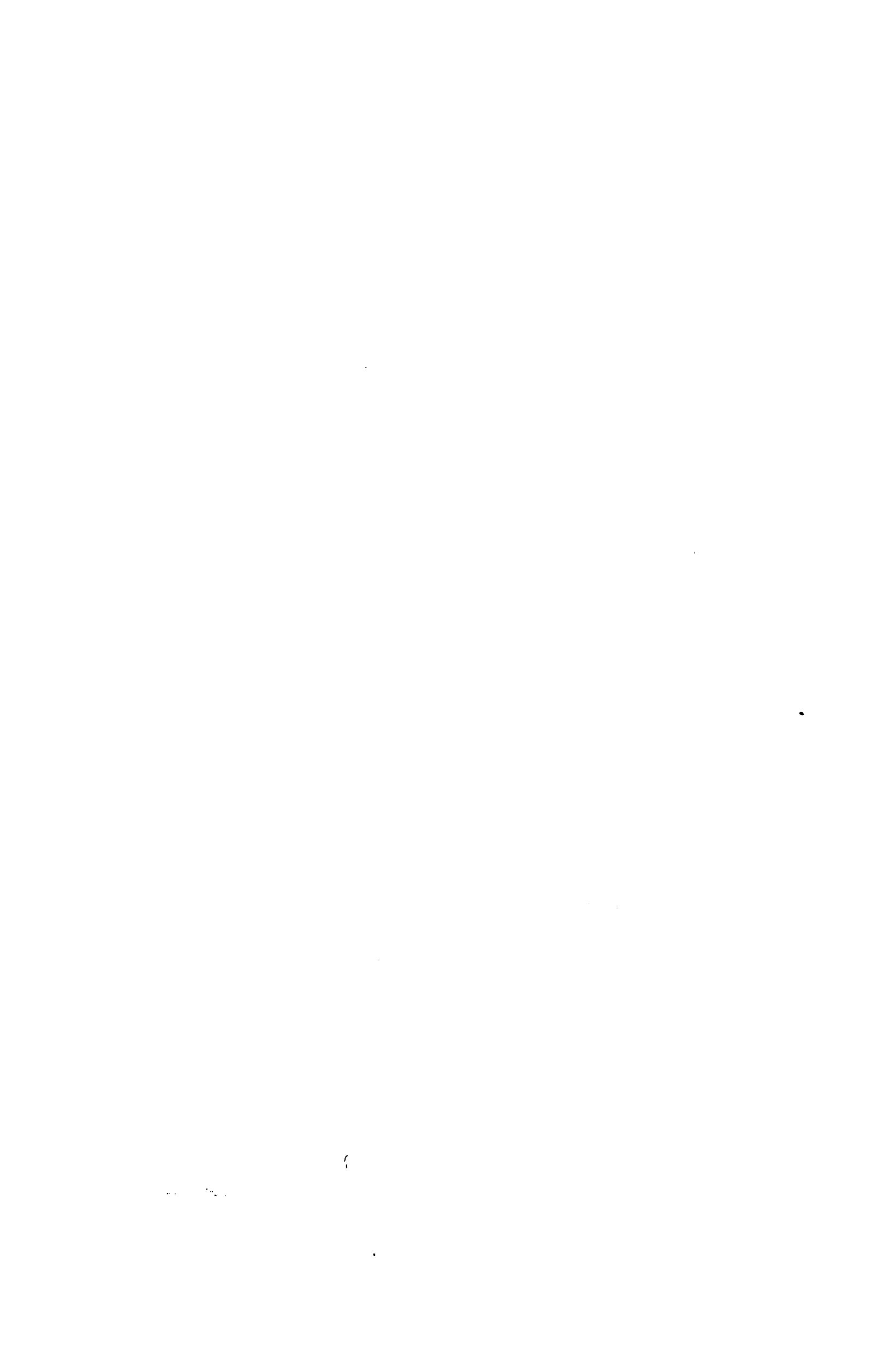
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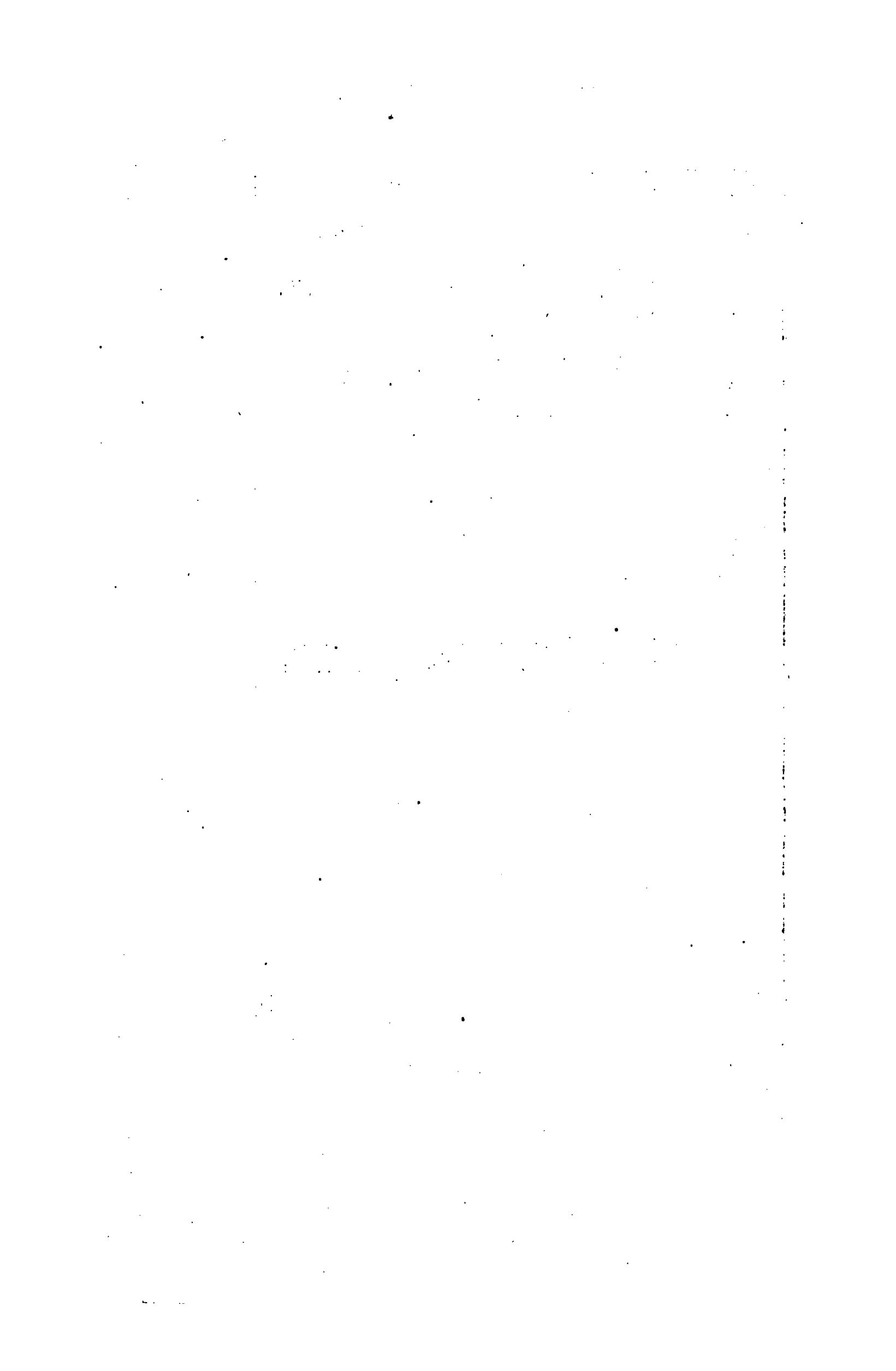
THE
REPORTS
AND
ARGUMENTS
Of that LEARNED JUDGE,
Sir JOHN VAUGHAN, Kt.
L A T E
LORD CHIEF JUSTICE
O F T H E
Court of Common-Pleas,
B E I N G
All of them SPECIAL CASES;

And many wherein he Pronounced the Resolution of
the whole Court of Common-Pleas, at the time he was
Chief Justice there.

Published by his Son, EDWARD VAUGHAN Esq;
Carefully Corrected from the Errors of the former Impression;
With many Additional References in this Second Edition.

L O N D O N,

Printed by the Assigns of Richard and Edward Atkins Esquires;
And are to be sold by C. Harper, A. Churchill, J. Harrison,
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J. Hartley, and E. Place. 1706.



WE all knowing the Great Learning, Wisdom, and Integrity of the Author,
Do, for the Common Benefit, allow the Publishing of these Reports and Arguments in
the same Letter as now they are Printed.

Finch C.

Ri. Raynsford.

Fra. North.

Tho. Twifden.

W. Montagu.

W. Wylde.

Tim. Littleton.

Hugh Wyndham.

Rob. Atkyns.

Edward Thurland.

V. Bertie.

Tho. Jones.

Will. Scroggs.

To the Reader.

thor of the Book. If they write *Elegantly* enough, or strain sufficiently in his *Praise*, they captivate the *Reader* (or at least conceive so) into a *good Opinion* of themselves; but the *sufficiency* of the *Author* must still appear from *his own Work*.

This therefore shall be, First, only such a brief Account of the *Author*, as is usual of *Persons* of his *Station* upon the like *Occasion*: And Secondly, the *Reason* why these *Papers* see the *Light*; which I conjecture the *Author* intended should have *died* with him; or *survived* him in very few *Hands*, and those such as he had a *particular Esteem* for.

He was the *eldest Son* of *Edward Vaughan* Esq; and born on the *Fourteenth of September*, in the *Year of our Lord 1603*.

at

To the Reader.

About the *Eighteenth Year* of his *Age* he was removed to *London*, and on the *Fourth of November*, in the Year 1621. admitted of the *Inner-Temple*, where I have often heard him say that he addicted himself to *Poetry*, *Mathematicks*, and such more *alluring Studies* at first, neglecting that *severer* of the *Laws of England*, until he became acquainted with that *incomparable Person* Mr. *J. Selden*, who discerning in him a *ready Wit* and *sound Judgment*, did studiously afford him *Occasion* of making a right use of two such *excellent Ingredients*, and frequently admitted him to the *Converse of himself*, and other *worthy Persons* his *Cotemporaries*, where having been *instructed* in the value of *Civil Learning*, he soon after apply'd himself closely to that *Course of Study*, and more particularly of the *Laws of England*, which he after made his *Profession*.

His

To the Reader.

the *Election* of a *Member* in his place) and he betook himself to those *Duties* wherein he was capable of serving his *Prince* in his *proper County*.

From the Year 1641. in which he retir'd from the *Parliament*, until the Year 1660. in which *God* blessed us with the *Restoration* of our *present King*, he did in a manner quit his *Profession*; for in that time he never received a *Fee* from any person whatever, nor could be prevail'd with to appear in any *Court*, altho' exceedingly importun'd to it by such as had a desire to make use of his *Abilities*: And the reason I have heard him assign for it was, *That it was the Duty of an honest Man to decline, as far as in him lay, owning Jurisdictions that derived their Authority from any Power but their Lawful Prince.*

Private

To the Reader.

from the *Author* to that purpose, I did for some time resolve should not have been made publick, although I well understood the value of some of them, wherein there are *Questions* handled, not familiar in any of our *Reports* yet extant, but in their Nature more Publick.

This *Resolve* of mine being imparted to some *Learned Gentlemen* of the *Coif*, and others who had a particular Esteem for the *Author*, begot *Importunities* for *Copies* of several of those *Arguments* then in my hands, which were procured, and soon after, by what means I know not, dispersed further than I intended them, and as I have been informed, cited as *Authorities*.

Thus having, without my privity, become so Publick, and apprehending that things in them.

To the Reader.

ed, being built upon *excellent Reason*, carry great weight with them at this day: whether the *Author* may be so *fortunate*, Time must determine. But I hope such as shall think fit to *oppose* such of his *Opinions* wherein he is *singular*, will first *reverse* the *Reasons* of them; for if *they* be not vanquished, the *Conclusions* thence deduced must prevail. So, *Reader*, I commit him to you, heartily wishing you the *Benefit* designed by this *Publishation*.

And one Edward Wootton Kt. Lord Wootton, was seized of one other third part of the Manor aforesaid, and of one third part of the Rectory Impropriate of Burton-Basset: to which third parts one other third part of the Advowson of the Vicarage aforesaid, that is, to present a fit person to the same Vicarage the second turn, when the same Vicarage then after should happen next to be void: And after the same second Presentation, then every third turn of the same Vicarage being void, for ever doth appertain, and then did appertain, in his Demesne as of Fee.

That the said Thomas Temple was likewise seized of another third part of the Advowson of the Vicarage aforesaid, that is, to present a fit person to the same the third turn, when the same Vicarage then after should happen next to be void: And after such third Presentation, then every third turn of the same Vicarage being void, for ever. *Uide uno grosso per se, ut de feodo & jure.*

That the said Thomas Temple being seized of the two third parts of the said Manor, to which, &c. the said Vicarage became void by the resignation of Thomas Freeman, then last Incumbent.

That thereupon the said Thomas Temple presented in his turn to the said Vicarage one John Reynolds his Clerk, who was admitted, instituted and induced thereto, in the time of the late King James.

That the said Edward Wootton being seized of the said other third part of the said Manor, and third part of the Rectory aforesaid, to which, &c. by reason whereof so seized at Burton-Basset aforesaid.

That after his death, the said third parts, to which, &c. descended to one Thomas Lord Wootton his Son and Heir, whereby the said Thomas Lord Wootton became therof seized in his Demesne, as of Fee.

That being so seized, he levied a Fine of the said third parts, to which, &c. in the Common-Pleas, 4 Car. 1. in Octab. St. Martini, to Nicholas Pay Esq; and Reginald Pay Gent. Complainants, the said Lord Wootton, Mary his Wife, and one Henry Wootton Kt. deforc.

That the said Fine was to the use of the said Lord Wootton and Mary his Wife, during their natural Lives, and the longest life of them; then to the use of the first son of the body of the Lord Wootton, and the heirs males of the body of such first son begotten, and so to the sixth son successively, and the heirs males

That the said Richard, 12 Decembr. anno 1654. presented to the said Vicarage in his turn one Richard Mansell his Clerk, who upon his presentation obtained the said Vicarage, and was in actual possession thereof; and so being in possession, a Statute was made the 25th of April, 12 of the King, for confirmation and establishing of Ministers in their Ecclesiastick Possessions, ordained by any Ecclesiastick Persons before the 25th of December then last past; And that the said Richard Mansell, by virtue of the said Statute, was real and lawful Incumbent and Vicar of the said Vicarage.

That the said Lord Wootton and Mary his wife being seized of the said third part of the said Manor and Rectory aforesaid for their lives, with Remainder as aforesaid, the said Lord Wootton so seized, dyed at Burton-Basset aforesaid.

That the said Mary survived him, and was thereof sole seized for term of her life by survivorship, and being thereof so seized, with Remainder, as aforesaid,

The said Margaret married the said John Tufton, and after the 8th day of August 22 Car. 1. by a writing under her hand and seal produc'd in Court by the said John Tufton, dated the same day and year, appointed that the said Fine levied as aforesaid in the fourth year of the King, should be, and the Conusees therein named should stand seized of the said third part, to the use of the said Margaret, and of the said John Tufton for term of his life, as by the said writing more fully appears.

By virtue of the said Fine, and Statute of Uses, the remainder of the said third part, after the death of the said Mary, belong'd to the said John Tufton and Margaret for term of the said John's life, with Remainder as aforesaid.

That the said Mary being seized of the said third part with, Remainder over as aforesaid, the said Margaret at Burton-Basset aforesaid, dyed without Issue of her Body, and the said John Tufton survived her.

That the said Mary afterwards, at Burton-Basset aforesaid, dyed seized of such her Estate, after whose death the said third part remain'd to the said John Tufton, who was thereof seized for term of his life, with Remainder over to the heirs of the Lord Wootton.

That the said Tufton being so seized, in a Stat. made at Westminster, begun the 8th day of May in the 13th year of his reign, and there continued until the 19th day of May in the 14th year of his reign, it was amongst other things enacted, That Parsons, Vicars, and other Churchmen being Incumbents of any Ecclesiastical Living,

true; and taking also by Protestation, that before the said Vicarage became void by the Deprivation of the said Rich. Mansell, and at the time it was so void, the said Rich. Temple was, and yet is, seized of the said two parts of the said Manor, and of the Advowson of the Vicarage of the said Church of Burton-Basset, as appertaining to the said two parts of the said Manor, in his Demesne, as of Fee and Right. And for Plea saith,

That he the said Chamberlain is Vicar of the said Vicarage by the Presentation of the said *Richard Temple*, and was thereto admitted, instituted and inducted.

Then traverseth, *absque hoc*, That the said *Thomas Lord Wootton* after the death of the said *John Reynolds*, so as aforesaid, presented to the said Vicarage, being void in his turn, the said *John Cragg*, as the said *Tufton* hath alledged, and demands Judgment.

As to the Bishop's Plea, his excuse is admitted, and the Plaintiff hath Judgment with a cessat executio against him, and a Writ to admit idoneam personam to the Vicarage, non obstante reclamacione.

To the Defendant Temple's Plea the Plaintiff demurs, and the Defendant Temple joins in Demurra.

To the Plea of Chamberlain the Incumbent the Plaintiff replies, That the said *Thomas Lord Wootton* after the death of the said *John Reynolds* Incumbent as aforesaid, presented to the said Vicarage, then vacant, in his turn as aforesaid, the said *John Cragg*, as the Plaintiff hath formerly alledged. *Et de hoc petit quod inquiratur per partiam.*

To which the Defendant Chamberlain doth not rejoin anything, nor joins in Issue; and therefore the Plaintiff hath Judgment to recover his Presentation as against him, and a Writ to the Bishop non obstante reclamacione, and to remove the Defendant Chamberlain from the Vicarage, notwithstanding his Admission, Institution and Induction, but with a cessat executio until the Plea be determined between the Plaintiff and the Defendant Temple.

THIS CASE in fact cannot be cut shorter than as it hath been open'd to be upon the Record; it being a History of several Presentations to the Vicarage of Burton-Basset, and of several suppos'd Titles, so to present in the persons who presented.

The Questions therefore in this case do arise from the causes of the Plaintiff's demurring to the Defendants Plea, which as hath been insisted on, are two.

1. The first is, That in a Quare Impedit Plaintiff and Defendant are both Actors, and either of them, as their Right happens to

Post 58. The Plaintiff must recover, if at all, by his own strength, and not by the Defendant's weakness, as is well urg'd and clear'd in Digby's and Fitzherbert's Case in the Lord Hobart.

The Defendant hath alledged in his Plea a Title pro forma, and that he hath presented by reason thereof, and that his Clerk is instituted and inducted, which is sufficient for the present and future time, if no better Title be opposed to it, without alledging any other Presentation in himself, or any from whom he claims.

Post 58. But if the Defendant were out of possession, as the Plaintiff is, he must then make out a good Title, as the Plaintiff now must, or else the Defendant should never have a Writ to the Bishop to admit his Clerk; and in such case only it holds true, that the Defendant is Actor as well as the Plaintiff.

And in such case he is to alledge a Seisin of the Advowson, as the Plaintiff must in himself, or those from whom he claims; which can never be done, without alledging a former Presentation, that being the only actual Seisin of an Advowson, for the cause why he should present to the present vacancy.

So as the not alledging a former Presentation will be no objection to the Defendant's Title; besides, the Plaintiff hath alledg'd a Presentation both in his ancestor Sir Tho. Temple of Reignalds, and in himself of Mansell for him: but I make no account of that, for if the Defendant will take advantage of a Title admitted him by the Plaintiff, he must take it as the Plaintiff gives it, which in this Case the Defendant doth not.

For the Plaintiff by his Count makes the Defendant's Ancestor and himself seiz'd in their Demesne as of fee, of two parts of three of the Manor of Burton-Basset, and of a third part of the Advowson of the Vicarage of Burton-Basset, as appendant to the said two parts.

But the Defendant by his Plea saith, he was seized in fee of two parts of three of the said Manor, and of the intire Advowson of the Vicarage, as appendant to the same two parts, and so presented, which is another Title than that admitted by the Plaintiff.

Ant. 7.

2. For the second cause of Demurrer, which is a point of more difficulty, I take it for Law, and shall accordingly prove it, That when the Defendant traverseth any part of the Plaintiff's Count or Declaration in a *Quare Impedit*, it ought to be such part as is both inconsistent with the Defendant's Title, and being found against the Plaintiff, doth absolutely destroy his Title; for if it doth not so, however inconsistent it be with the Defendant's Title, the Traverse is not well taken.

To

For whether the Plaintiff were seized or not of the Advowson in gross, he presenting in the vacancy, and his Clerk being admitted, instituted and inducted, he thereby gained a good Title by Usurpation to present when the Church became next void.

And that is the true reason in that Case, why the Presentation, which made the Plaintiff's immediate Title to present again, was to be traversed, and not his Seisin in gross of the Advowson, which was not material, when his Usurpation gave him a Title, though he were not seiz'd in gross before his Usurpation.

Ander. 1 part The next Case I shall use is as good Authority out of the *£ 269. p. 276.* New Books as the other was out of the Old; It is the L. Buckhurst's Case, reported in the first part of the L. Anderson.

The L. Buckhurst brought a Quare Impedit against the Bishop of Chichester and T. Bickley for disturbing him to present to the Vicarage of Westfield, and declared, That the Advowson of the Vicarage appertain'd to the Rectory of Westfield, whereof he was seized in fee, and presented Maurice Sackvil his Clerk, who was thereto admitted, instituted and inducted; That the Vicarage was a Vicarage with Cure, of the annual value of 8*l.* And that the said Sackvil accepted another Benefice with Cure, by reason whereof, and of the Statute of 2*1 H. 8.* the Vicarage became void, and he presented, and was disturbed by the Defendants.

The Bishop pleaded, That before the Writ purchased, one Richard Bishop of Chichester, his predecessor, was seized of the Advowson of the said Vicarage in fee as in gross, and collated to the said Vicarage, being void, one Maurice Berkley, who was inducted thereto; and the said Richard dying, the present Bishop was made Bishop, and became seized of the Advowson, and the Church became void by the said Sackvil's taking another Benefice with Cure, and he collated the said Bickley the other Defendant, and traversed *absq; hoc*, That the Advowson of the said Vicarage pertained to the Rectory of Westfield, modo & forma as the Plaintiff alledg'd. And Bickley, the other Defendant, pleaded the same Plea.

Upon this Plea it was demurred, because the Traverse to the Appendency was not good, as was alledged; and after much Argument, and many Cases cited, where the Appendency was traversable,

The Court resolved the Appendency was not traversable in the Case; nor was it material whether the Advowson were appendant

As in these two Cases the true reason of the Law appears, why the Seisin in gross of the Advowson, nor the Appendency of the Advowson alledged by the Plaintiffs, were not traversable, but only the Presentation.

Hob. Digby's Case, fo. 103. By these cases the Lord Hobart's scruple in Digby's Case is satisfied, where he thinks, that if a man hath gained a Title by Usurpation at the next avoidance, he must not declare that he was seized in Fee formerly of the Advowson, and presented; but must declare specially of the true Patrons former Presentation, and then the Church becoming void, that himself presented, lest otherwise he declaring that he was seized of the Advowson in Fee, the Defendant should trice him by traversing his Seisin, which was false, when in truth he had a Right to present by Usurpation; for by these Cases it is clear, that the Seisin in gross nor Appendency are traversable, tho' alledg'd by the Plaintiff, when he hath got a Title by Usurpation, but the Presentation ought to be traversed.

I shall for clearing this Learning shew in the next place, when the Seisin in gross, or Appendency of the Advowson alledg'd by any Plaintiff in his Count is traversable by the Defendant, and not the Presentation, and the true reason of the difference.

17 H. 8. f. 29. In a Quare Impedit, the Plaintiff declared, That J. S. was seized in Fee of a Manor, to which the Advowson was appendant, and presented, and after infeoffed the Plaintiff of the Manor, whereby he became seized till the Defendant disseized him, and during the Disseisin the Church became void, and the Defendant presented; the Plaintiff entred into the Manor, and so recontinued the Advowson, and the Church is again become void, whereby the Plaintiff ought to present.

The Defendant pleads, That a stranger was seized of four Acres of Land, to which the Advowson is appendant, and presented, and of the four Acres infeoffed the Defendant; and the Church being void, it belongs to the Defendant to present; and takes a Traverse, absq; hoc, That he disseized the Plaintiff of the Manor.

This Traverse was adjudged not good; for the disseisin or not disseisin of the Manor was not material to intitle the Plaintiff to the Quare Impedit; but all his Title was by the appendency of the Advowson to the Manor, and therefore the Traverse ought to have been, and was so resolved to the appendency, which destroyed the Plaintiff's intire Title to present, and also inconsistent with the Defendants appendency of the Advowson to his four acres.

vacantem. Et ad nostram Præsentationem jure Prærogative Coronæ nostræ Angliæspectantem; and her Clerk instituted by Letters of Institution, running per Dominam Reginam, veram & indubitatam, ut dicitur, Patronam.

And after the death of Snell, King James presented Rone in these words, ad nostram Præsentationem, sive ex pleno jure, sive per lapsus temporis, sive alio quounque modo spectantem; and refer'd to the Court, whether the Advowson were appendant to the Manor or not? It was adjudged,

1. That the Advowson remain'd appendant, notwithstanding the Queens Presentation.

2. That her Presentation could not be by lapse, for her Presentation and Institution and Induction were in the same month of February wherein the voidance was.

3. If the Queen had presented by lapse, it had made no severance of the Advowson.

4. That the Queens Presentation made no Usurpation, because she presented as supposing she had a Title in right of her Crown, as appeared by the form of her Presentation, which is very remarkable, and therefore her Presentation was merely void; for it shall not be intended the Queen took away anothers Right against her own will and declared intention.

5. For the same reason K. James his Presentation of Rone, who by the form of his Presentation supposed he had a good Title when he had none, was also void. And this agrees with the Resolution in Green's Case, the 6th Rep. that the Queens Presentation made as by lapse, when she had no such Title to present by lapse, but another Title, either in Right of her Crown, or by Simony, or some other way, was void, because she was mistaken in her Presentation: So if she presents by reason of some supposed Title in her Letters of Presentation, when indeed she had no Title at all, the Presentation is merely void; and tho' such Presentation make a Plenarty, so as to avoid lapse, yet the right Patron is not out of possession, but may present seven years after; and if his Clerk be induced, the former Presentee is immediately ousted.

Hence it is to be noted, as a point very observable in this Learning, that tho' the King may present by Usurpation, yet he shall never present by Usurpation, if in the Letters of Presentation he present by some Title which he hath not: but if he present generally, making no Title at all by his Presentation, and his Clerk be received and dies, he hath gained a Title by Usurpation.

But if the King declare in a Quare Impedit, That he was Set-
zed

have been as appendant, had been omitted in the Case.

But those words make the latter Case in 10 H. 7. exactly to agree with the Judgments both in Sir Henry Gawdy's Case in Hob. and Green's Case in the 6th Rep.

15 H. 6. Fitz.
Quare Impedit.
num. 77.

To the four first Cases may be added the Case of 15 H. 6. where the Plaintiff counts in a Quare Impedit, That his Ancestor was seized of a Manor, to which the Advowson is appendant, and presented, and died, and that the Manor descended to the Plaintiff, and the Church became void, whereby he ought to present. The Defendant pleads, That long after the Presentation alledged by the Plaintiff, the Defendant was seized of the Advowson in fee, and presented such a one; and after the Church became void, and he presented the present Incumbent. And this Plea was allowed a good Plea by the Court, without answering to the Appendency alledged by the Plaintiff, which was in effect avoided by the Defendant's Presentation after. And in this Case the Plaintiff was without remedy, unless he could traverse the Presentation alledged by the Defendant, otherwise than by his Writ of Droit d'Advowson.

Crook 2 Car. f. 6. Sir Greg. Fenner *vers.* Nicholson & Patfield.

As also the Case in Crook. If the Plaintiff make Title to present, as being seized of an Advowson in gross, or as appendant; and the Defendant make Title, as presented by reason of a Simoniacal Presentation made by the Plaintiff, and thereby a Devolution to present to the King, under whom the Defendant claims: Because the Defendant doth admit the Advowson to be in gross or appendant in the Plaintiff, and that neither of them is inconsistent with the Title made by the Defendant, he shall not traverse the Seisin in gross, nor the Appendency; but because somewhat else is necessary to give the Plaintiff Right to present, that is, the vacancy of the Church, either by Death, or Resignation, or Deprivation, which the Plaintiff must alledge, and which are inconsistent with the Defendant's Title, who claims not by vacancy by Death, Resignation or Deprivation, but by the Simony, therefore he shall traverse the vacancy alledged either by Death, Resignation or Deprivation, as the Case falls out, without one of which the Plaintiff makes no Title; and if the present vacancy be by either of them, the Defendant hath no Title.

Now to apply these Cases to the Question before us, Whether the Defendant should have traversed the *Presentation* of the Lord Wootton alledged by the Plaintiff, or the *Appendency* (which he hath done) to the third part of the Manor, and third part of the Rectory of Burton-Basset? It seems clear, That in all Cases of *Quare Impedits*, the Defendant may safely traverse the Presentation

on

Paſch. 19 Car. 2. Rot. 484 C. B.

Henry Edes Plaintiff in a Quare Impedit, against Walter Bishop of Oxford.

That he was, and is, seized of the Advowson of the Church of Chymer, in gross, in fee, and thereto presented William Paul his Clerk, who was instituted and inducted accordingly; That after, the Church becoming void, and so remaining by the death of the said William Paul, and it belongs to him to present, he is hindered by the Defendant.

The said Bishop, by Protestation, saying the Church did not become void by death of the said William Paul, pleads, That the said Church was full of the said *Paul*.

The said William Paul was created Bishop of Oxford, whereby the said Church became void, and the Right of Presentation devolv'd to the King by Prerogative.

^{25 H. 8. c. 21.} Then pleads the Clause of the Act of 25 H. 8. which impowers the Archbishop of Canterbury to give Faculties and Dispensations, as the Pope did, at large.

That after, and before the Writ purchased, decimo of the King, the said William Paul died at Oxford.

That after his death, the Defendant was elected Bishop of Oxford, and after, and before the Writ purchased, viz. the 27th of Novemb. 1665. Gilbert, now Archbishop of Canterbury, and Primate of all England, by his Letters of Dispensation, according to the said Act, and directed to the said Walter, the Defendant, now Bishop, under his Seal, then elect, and upon the Bishop's Petition of the Means of his Bishoprick,

Graciously dispensed with him, together with his Bishoprick, the Rectory of *Whitney*, in the Diocess and County of *Oxford*, which he then enjoyed; and the Rectory of *Chymer* aforesaid, which he by the King's favour shortly hoped to have, to receive, hold, retain and possess *in commendam*, as long as he lived and continued Bishop of *Oxford*, with or without Institution and Induction, or other Solemnity Canonical, and to take and receive the Profits to his own use, without Residence. *Quantum in eodem Archiepiscopo fuit, & Jura Regni paterentur.*

The

Post 23.

3. That any Dispensation after the Consecration comes too late to prevent the Voidance.

4. That the Pope could formerly, and the Archbishop now, can sufficiently dispense for a Plurality by 25 H. 8.

I shall therefore first make one general Question upon the Case as it appears.

Whether *William Paul*, Rector of *Chymer*, and elected Bishop of *Oxford*, and before his Consecration dispensed with by the Archbishop to retain his said Rectory with the Bishoprick, and having the said Letters of Dispensation confirmed by the King, and in roll'd, *modo & forma prout* by the Record, did not by virtue of the said Dispensation and Confirmation prevent the Voidance of his said Rectory by Cession upon his Consecration?

~~For if he did, the Rectory became not void until his death, and by his death the Plaintiff, being Patron, hath Right to present.~~

To determine the General Question, I shall make these Questions, as arising out of it.

1. Whether any Dispensation, as this Case is, be effectual to prevent an avoidance after Consecration?

2. Whether the Archbishop hath power, with the King's Confirmation, to grant such a Dispensation?

3. Whether this Dispensation in particular be sufficient to prevent a voidance of Chymer after Consecration of the late William Paul.

1. This Case differs from the Bishop of *Ossory*'s Case in *Sir J. Davis's Reports*, who had a Faculty accipere in commendam, with odd power, and executed it by collating himself into a Living void by lapse.

2. It varies from the Case of *Colt* and *Glover* in the *Lord Hobart's Reports*, and the Dispensation there to the Bishop elect of *Lichfield* and *Coventry*, which was to retain one Benefice whch he had; and propria autoritate capere & apprendere as many as he could, under a certain value.

The defects of that Dispensation are numerous, and excellently handled by the *Lord Hobart* in that Case of *Colt* and *Glover*: But in our Case there is no affinity with the defects of those Dispensations, but is barely to retain what legally was had before.

Obj. 1. An Incumbent of a Church with Cure being consecrated Bishop *Thyning* shop, his Living was void by the Law of the Land; therefore The Bp. of St. the Pope could not prevent the voidance after Consecration, *Davids Case.* 11 H. 4. f. 37. for then the Pope could change the Law of the Land; and if b. 38. a. the Pope could not, the Archbishop cannot. The Rolls f. 35. 8. ob. 1. 11 H. 4. f. 60. B. per Hill. Ant. 19. Post 22.

Besides, their meaning is to be learn'd, who say an Incumbent's Benefice, made a Bishop, is void by the Common-Law, and not by the Canon-Law. The words of Thyrning in that case, 11 H. 4. are, (who was then Chief-Justice.)

11 H. 4. f. 60. b.
Da. Rep. f. 81.
a. & f. 68. b.
Ant. 20.

I suppose that when a man benefic'd is made a Bishop, it is by the Law of holy Church that his Benefice becomes void, and the same Law which gives the voidance, may cause that it shall not be void, and that concerns the Power of the Apostle. The Common-Law doth not prohibit Pluralities, nor make a voidance of his Benefice when the Incumbent is Bishop, but the ancient Ecclesiastical Law of England.

Obj. 3. It is a Contradiction, that the Incumbent being the Bishop's Subject, and the Bishop his Sovereign, should be united: the Servant, qua Servant, may as well be Master; the Tenant, qua Tenant, Lord; the Deputy, the Deputor; the Delegator, the Delegated; which is impossible.

Ans. It is a Contradiction, that a person subject, being so, should not be subject; but no Contradiction, that a person subject should cease to be so: The subjection of the Incumbent ceaseth when the Rectory is in the Bishop; the Deputy is not, when the principal Officer executes the Office in person; and, relation of Lord and Tenant destroy'd, when the Lord occupies the Land himself.

If an Act of Parliament should enable every Bishop to hold his former Benefices, no Contradiction would follow, nor doth now by the Dispensation.

And note, all these Reasons deny the Pope's Power formerly, the Archbishop's now, and the King's also; for they are not Reasons against the Power of the party dispensing, but that the subject-matter is capable of no Dispensation.

Siderfin 305. There is no inconsistence for a Bishop to be an Incumbent, for he is a Spiritual Corporation, and being Patron of a Living, might and may have it appropriate, that is, to be for him and his Successors perpetual Incumbents.

Da. Rep. f. 80. b. The Rectories of *Eastmean* and *Hambleden* are appropriate *ad mensam* of the Bishop of *Winchester*, and many others in *England* and *Ireland* so appropriated.

Selden hist. of Tithes, c. 6. Every Bishop, many hundreds of years after Christ, was Universal Incumbent of his Diocese, received all the Profits, which par. 3. f. 80. b. were but Offerings of Devotion; out of which he paid the Salaries of such who officiated under him as Deacons or Curates in f. 253. places appointed.

pluralitate Beneficiorum restricta est, saltem in Dignitatibus & Beneficiis curatis, sed circa beneficia simplicia bene poterunt Episcopi dispensare. And in the same gloss, In Dignitatibus & Cu-
ratis solus Papa dispensat.

Authority in the point, That a Rector of a Church dispens'd with according to 25 H. 8. before he is consecrated Bishop, remains Rector, as before, after Consecration.

38 H. 6. f. 19. 1. Where the Pope licenses one who is created a Bishop to retain his ancient Benefice, and the Patron presents another, the elder Incumbent sues a Spoliation in the Spiritual Court, it well lies, for both claim by the same Patron, Quæ supradicta omnes concesserunt, saith the Book.

Fitz. N.B. tit. Spoliation, f. 36. b. 2. The Writ of Spoliation lies properly by one Incumbent against another Incumbent, where the Right of the Patron comes not in debate.

As, if a Parson be created Bishop, and hath a Dispensation to hold his Rectory, and after the Patron presents another Incumbent, who is instituted and inducted, the Bishop shall have against that Incumbent a Spoliation, this proves the Bishop to continue Incumbent after his Consecration, and to hold his Rectory by his former Presentation.

Dy. 6 El. f. 128. John Packhurst, Rector of Cleve in Gloucestershire, had a Dispensation to hold it, notwithstanding he were advanc'd to any Bishopric in the Realm, for three years from the Feast of St. Michael, 1560. to the same Feast, 1563. He was after consecrated Bishop of Norwich, and within the three years resign'd. The Queen presented one her Chaplain, supposing she had Title by cession of the Bishop: Sir H. Sydney the Patron brought a Quare Impedit, and the Church was found to be void by Resignation of the Bishop of Norwich, and recover'd, and had Judgment.

Post 25. 1. This Case proves the Bishop of Norwich Incumbent, as formerly, notwithstanding his Consecration, else the Living had not voided by his Resignation.

Post 25. 2. The Dispensation was only for three years, yet he was an entire Incumbent, and might resign during those three years, as if he had not been Bishop.

Hob. 3. It proves the Dispensation may be for a time only to hold his former Benefice, & ad modum concedenits, which clears the last Question, that in such a Commendam retinere the Dispensation is good; tho' it be but for as long as he is Bishop of that See, and then determines.

If after the death of the last Bishop, who held this Church by Dispensation, the King may present, as the Case is, the next succeeding Bishop to hold it by Dispensation, he may so present the third, and so toties quoties there shall be a Bishop of Oxford, and for the same reason, viz. the small Incomes of the Bishoprick.

So shall the Patron for ever lose his Presentation, omitting nothing to be done, nor committing any thing not to be done, but doing his duty in presenting a fit person, and who deserve'd to be made Bishop.

Objections.

Tr. 9 E. 3. pl. 6. 18 E. 3. f. 21. & 18 E. 3. and the Abbot of Thorney's Case there cited, That if the King recover in a Quare Impedit, and after confirms the Incumbent's Estate, yet after the Incumbent's death the King shall present; and therefore in this Case.

Ans. 1. When the King hath recovered in a Quare Impedit, he hath Right to present uncontrollably by the Record, and may at his pleasure sue forth Execution, and in the mean time permit the Incumbent to continue in the Benefice at his pleasure: but here it is deny'd that the King hath any right to present.

Ans. 2. The King's permission or grant, that the Incumbent should not be troubled during his life, cannot be pleaded by the Patron in bar of the King's right to present by virtue of his Judgment, for the King's permission was nothing to the Patron, and the King ought to have Execution of his Judgment when he demands it against him.

Ans. 3. Justice Thyrning also gives the reason of those Books: The cause, saith he, is, although the King confirms the Incumbent's Estate, yet he had not his Estate or Possession by the King, but by his Patron's Presentment, and by the King's Confirmation his Right was neither executed nor extinct.

Ans. 4. The King's Confirmation in the present Case is not of the nature of his confirmation in the Case of 9 E. 3. for he doth not here as there he did, intend to transfer any Right of his unto the Incumbent, by continuing his possession: but his Confirmation here is only formal, and to compleat the Dispensation of the Archbishop, which is not sufficient by the Rule of the Act of 25. unless confirmed by the King. It was otherwise in the Pope's Case before the Act.

There

Hill. 19 & 20 Car. 2. C. B. Rot. 1785.

Baruck Tustian Tristram Plaintiff, Anne Roper Vicountess
Baltinglass Vidua, Defendant, in a Plea of Trespass
and Ejectment.

² Jones 27.

The Plaintiff declares, That the Defendant, vi & armis,
entered into 20 Messuages, 1000 acres of Land, 200 acres
of Meadow, and 500 acres of Pasture, cum pertinentiis, in Thorn-
bury, Shalston, Evershaw, Oldwick, Westbury, and Looffield, and
into the Rectory of Thornbury, which Thomas Gower Kt. and
Bar. and George Hilliard to the said Baruck devised the first
of Octob. 19 Car. 2. Habendum from the Feast of St. Michael the
Archangel last past, for the term of Five years next ensuing; in-
to which he the said Baruck the same day entered, and was ousted
and ejected by the Defendant, ad damnum 40 l.

To this the Defendant pleads, Not Guilty.

And the Jury have found specially, That the Defendant is
not guilty in all those Tenements, besides 5 Messuages, 400
acres of Land, 50 acres of Meadow, 100 acres of Pasture, cum
pertinentiis, in Thornbury, Shalston, Evershaw, Oldwick, and
Westbury, and in the Rectory of Thornbury; and besides, in
one Messuage, 100 acres of Land, 50 acres of Meadow, and
100 acres of Pasture, cum pertinentiis, in Looffield.

And as to the Trespass and Ejectment aforesaid, in the said
five Messuages, &c. and in the Rectory of Thornbury, the Jury
say upon their Oath, That before the said Trespass and Eject-
ment supposed, 22 Junij, 12 Jac. Sir Arthur Throgmorton Kt.
was seized in fee of the aforesaid Rectory and Tenements last
mentioned, and of the said premises in Looffield; and so seiz'd,

A certain Indenture Tripartite was mad, 22 Junij, 12 Jac. be-
tween him the said Sir Arthur of the first part, Edward Lord
Wootton, Augustine Nichols Kt. Francis Harvey Esq; and Row-
ley Ward Esq; of the second part, and Sir Peter Temple, and
Anne Throgmorton, Daughter of the said Sir Arthur, of the
third part.

Ca

cording to the true meaning of their Indentures of Lease, and commit no Waste of and in the things to them demised.

The like Proviso verbatim, For Sir Peter Temple and Anne his Wife, to make like Leases during their Lives, and the Life of the longer liver of them, after the death of Sir Arthur, and Dame Anne his Wife.

That a Fine was accordingly levied, &c. to the Uses aforesaid.

They find that all the Messuages, Lands, Tenements and Redory in the Declaration mentioned, are comprised in the said Indenture Tripartite.

They find the death of Sir Arthur Throgmorton and Anne his Wife, 2 Septemb. 1 Car. 1. and that Sir Peter Temple entred, and was seised for term of his life.

They find he had Issue of the Body of Anne his Wife, Anne the now Defendant, Daughter and Heir of the Bodies of the said Sir Peter and Anne his Wife; and that Anne, Wife of Sir Peter, died 2 Sept. 3 Car. 1.

1. They find a Demise by Sir Peter Temple to Sir Thomas Gower and Hillyard of the Redory of Thornbury, 9 Maij, 23 Car. 1. for 30 l. Rent.

2. They find a Demise by him to them of a Messuage in Thornbury, 9 March, 23 Car. 1. of Woolhead's Tenement, for 16 l. 13 s. 4 d. Rent.

3. They find a Demise to them, 9 March, 23 Car. 1. of Land in Thornbury, held by Roger Rogers, Rent 13 l. 6 s. 8 d.

4. They find a Demise, 9 March, 23 Car. 1. of Nelson's Tenement in Thornbury, Rent 16 l. 13 s. 4 d. at Michaelmas and Lady-day.

5. They find a Demise, 13 March, 23 Car. 1. of Lands in Shalston, Eversham and Oldwick, held formerly by William Hughes, Rent 15 s. 4 d.

These respective Leases were made for the term of Ninety Years, determinable upon the Lives of the Lady Baltinglass the Defendant, Sir Richard Temple's, and the Life of a younger Son of Sir Peter Temple, as long as the Lessees should duly pay the Rents reserved, and commit no Waste, according to the Limitation of the Proviso in 12 Jac. which is recited in the respective Leases.

6. Then the Jury find, Quod predicti separales redditus super predicti separalib' Indentur' reservat' tempore dimissionis fuerint reservat' redditus de & super summis predicti 22 die Junij, anno Jacobi Regis 12. predicti. Et quod predicti separales redditus, &c. in forma

Sir Arthur Throgmorton, by Limitation of the Proviso in the Deed, 12 Jac. so as the Leases were not Leases upon condition to pay the Rent at the day, to which any Demand or Re entry was requisite for Non-payment; but were Leases by Limitation, and determined absolutely according to the Limitation. **For**
Litt. E. 235. 2. **this, Littleton is express,** that the words quamdiu, dum, and dummodo, are words of Limitation. As, if a Lease be made to a Woman, dum sola fuerit, or dum casta vixerit, or dummodo solverit talem redditum, or quamdiu solverit talem redditum; so are many other words there mentioned. And if there be not a Performance according to the Limitation, it determines the Lease.

But it is otherwise where a Rent is reserved upon Condition; for there is a Contract between the Lessor and Lessee, and the Law evens the Agreement between them, as is most agreeable to Reason, and the supposition of their Intention.

But in the present Case Sir Peter Temple had no Interest in him, out of which such Leases could be deriv'd, but had a Power only to make them, by virtue of the Proviso in Sir Arthur Throgmorton's Deed, and the Lessees must be subject to such Limitations as are thereby made.

It was agreed by the Council of the Plaintiff, That it was not a Condition for payment of the Rent, nor could it be; but they would call it a Caution. A Condition to determine a Lease or a Limitation, is a Caution, and a material one; but such a Caution hath no more effect than if it were not at all, is a thing insignificant in Law; and therefore must not supplant that, which in proper terms is a Limitation, and hath an effect.

2. The next Question is upon the Lease of Looffield, which arises upon the words of the Proviso, That it should be lawful for Sir Peter Temple to demise all or any the premises, which at any time heretofore have been usually letten or demised for the term of One and twenty years or under, reserving the Rent thereupon now yielded or paid.

And the Jury finding the Lands in Looffield to have been demised 12th of the Queen for Twenty one years for 100 l. Rent; and that that term was expired, and not finding them demised by the space of Twenty years before at the time of the Indenture, 12 Jac. Whether the Lease by Sir Peter Temple of them, be warranted by the Proviso, there being reserved the Rent reserv'd by the Lease in 12 Eliz. viz. 100 l.

The

But I insist not much upon this Case, for the words usually demised may be taken in two senses: The one for the often farming, or repeated acts of leasing Lands, to which sense this Case doth reasonably extend.

But the other sense of Land usually demised, is for the common continuance of Land in Lease, for that is usually demised; and so Land leased for Five hundred years long since, is Land usually demised, that is in Lease, tho' it have not been more than once demised, which is the more received sense of the words, Land usually demised.

2. The meaning of the words, at any time, is various, and of contrary meaning: If it be asked by way of Question, Were you at any time at York? it is the same as, Were you ever or some time at York? So in the Question, Was this Land at any time in lease? is the same as, Was it ever, or some time in lease?

But when the words, at any time, are not part of a Question, but of an Answer, they have a different and contrary meaning. As if it be ask'd, Where may I see or speak with John Stiles? and it be answered, You may speak with him, or see him at any time at his House: there the words at any time, signify at all times, and not as in the Question, at some time.

So when the words are used by way of a plain enunciation, and not as part of a Question or Answer; As, You shall be welcome to my House at any time, signify, You shall be welcome at all times.

So in the present Case, if it be made a Question, Was such Land heretofore at any time usually letten and set to Farm? imports in the Question, Was this Land ever, or at some time heretofore (how long ago soever) usually let to farm?

But by way of enunciation if it be said, This Land was usually let to farm at any time heretofore; it means, This Land was commonly, at all times heretofore, let to farm.

So this Land was usually in Pasture at any time heretofore, signifies, this Land was always, or commonly in Pasture heretofore.

So, You may lease any Land heretofore letten to farm at any time, usually, is the same with, Heretofore letten to farm commonly at all times. And this Construction of the Proviso agrees both with the words and intention of Sir Arthur.

But what was not farmed at the time of this Proviso made, nor Twenty years before, could not be said to be at any time before commonly farmed; for those Twenty years was a time before, in which it was not farmed. But

Hill. 21 & 22 Car. 2. Rot. 2259. C. B.

Hartf. st. *Ralph Dixon Plaintiff, versus Dean Harrison Defendant :*
In a Replevin, Quare cepit Averia ipsius Radulphi, &
ea detinuit contra vadios & plegios, &c.

Distress, 21
 Maij, 21 Car.
 2.
 3 Jones 2. *The Plaintiff declares, That the Defendant, 21 die Maij,*
21 Regis nunc, at Sandridge, in a place called Fregmore-
field, took three Cows of the Plaintiff's, and detained them
against Pledges quoique, to his Damage 40 l.

The Defendant, as Bassif of Elizabeth Rooper Widow, Sa-
muel Hilderham Gent. and Mary his Wife, Mich. Biddulph Esq;
and Frances his Wife, Humphrey Holden Esq; and Theodosia
his Wife, avows and justifies the Caption; for that the place
in quo, &c. contains a Rod of Land cum pertinentijs in Sand-
ridge aforesaid.

That long before the Caption, Ralph Rowlett Kt. was seis'd
of the Manor of Sandridge in the said County, whereof the
said place is and was parcel time out of mind.

Grant of the
 Rent, June 26.
 8 Eliz. *That the said Sir Ralph, 26 Junij, 8 Eliz. at Sandridge aforesaid,*
by his Deed in writing under his Seal, produced in Court,
thereby granted and confirmed to Henry Goodyear, then Esquire,
and after Knight, and to the Heirs of his Body, a yearly Rent of
30 l. out of all his said Manor, and other his Lands in Sandridge
aforesaid, payable at the Feasts of St. Michael the Archangel, and
the Annunciation.

The first payment at such of the said Feasts which should hap-
pen after the expiration, surrender, or forfeiture to be made after
Sir Ralph Rowlett's death, of certain terms of years, of parcel of
the premisses made to one William Sherwood and Ralph Dean se-
verally.

With Clause of Entry and Distress to Henry, and the Heirs
of his Body, if the Rent were unpaid.

And that Sir Ralph gave the said Henry Seisin of the said
Rent, by payment of a penny, as appears by the Deed.

Rowlett's
 death, 1 Sept.
 33 Eliz. *Sir Ralph Rowlett, after the first day of September, 33 Eliz.*
at Sandridge aforesaid, died.

That

That after the second day of September, 33 Eliz. the said Terms expi-
terms of years expired, whereby the said Henry became seized red Sept. 2.
of the said Rent in tail. 33 Eliz.

That Henry had Issue the said Elizabeth and Mary, and H. Goodyear
one Anne, his Daughters and Coheirs, and died 1 Octob. died 1 Octob.
33 Eliz. so seized.

That the said Coheirs, being seized of the said Rent to Mary marry'd
them and the Heirs of their Bodies, May 1. 1634. Mary Sam. 1 May
married the said Samuel Hildersham, and Anne married one John 1634. & Anne
Kingston, whereby the said Elizabeth, and Samuel and Mary in the same time
Right of the said Mary, and John and Anne in Right of Anne, married John
were seized of the Rent. Kingston.

December 25. 1635. Anne had Issue by John her Husband, Anne had Il-
the said Frances and Theodosia; and John her Husband and
Anne died 1 Jan. 1635.

That thereby Elizabeth, Samuel and Mary, in Right of Ma- her Husband
ty, Frances and Theodosia, became seized of the Rent. John died
1 Jan. 1635.

April 10. 1647. Frances married the said Biddulph, and The-
odosia the said Humphrey Holden, whereby Elizabeth, Samuel
and Mary, in Right of Mary; Biddulph and Frances, in Right
of Frances; and Holden and Theodosia, in Right of Theodosia,
became seized of the Rent.

And for 120 l. for four years Arrear after the death of John
and Anne, ending at the Feast of St. Michael 1655. being un-
paid at the time and place, &c. the Defendant, as their Bailiff,
entered, and distrained the said Cows.

The Plaintiff demands Oyer of the Deed of Grant, and hath
it in these words, &c.

And then the Plaintiff replies, That before the time of the
Caption, that is, à die Pasch' in quind' dies, a Fine was levied
in the Court of Common-Pleas, in the 21 of the King, before
the Justices there, &c. between Richard Harrison Esq; and the
Avowants of the said Rent, with Warranty to the said Richard
and his Heirs.

And that this Fine was to the Use of the Conisors and their
Heirs, and demands Judgment.

The Defendant thereupon demurs.

WHERE the Law is known, and clear, though it be un- Post 285.
equitable and inconvenient, the Judges must determine as
the Law is, without regarding the unequitableness or
inconveniency.

Post 285.

Those defects, if they happen in the Law, can only be remedied by Parliament; therefore we find many Statutes repealed, and Laws abrogated by Parliament, as inconvenient, which before such Repeal or Abrogation were in the Courts of Law to be strictly observed.

Post 285.

But where the Law is doubtful, and not clear, the Judges ought to interpret the Law to be as is most consonant to Equity, and least inconvenient.

And for this reason, Littleton in many of his Cases resolves the Law not to be that way which is inconvenient; which Sir Edward Coke in his Comment upon him often observes, and cites the places, Sect. 87.

In the present Case there are several Coparceners, whereof some have Husbands seized of a Rent-charge in tail: the Rent is behind, and they all levy a Fine of the Rent to the Use of them and their Heirs.

If after the Fine levied, they are barr'd from distraining for the Rent Arrear before the Fine? is the Question; It being agreed they can have no other Remedy, because the Rent is in the Reality, and still continuing.

Post 39.

If they cannot distrain, the Consequents are,

1. That there is a manifest Duty to them of Rent, for which the Law gives no Remedy; which makes in such a case the having of Right to a thing, and having none, not to differ: for where there is no Right, no Relief by Law can be expected; and here, where there is Right, there is as little; which is as great an absurdity as is possible.

2. It was neither the intention of the Conizors to remit this Arrear of Rent to the Tenants, nor the Tenants to expect it; nor could the Conizors remit it but by their words or intentions, or both; nor did they do it by either.

3. It is both equitable in it self, and of publick convenience, that the Law should assist men to recover their due, when detained from them.

4. Men in time of Contagion, of Dearth, of War, may be occasioned to settle their Estates, when they cannot reasonably expect payment of Rents from their Tenants for itves, or others, and consequently not seasonably distrain them; and it would be a general inconvenience in such a case to lose all their Rents in Arrear. So as both in Equity and Conveniency the Law should be with the Avowants.

In

nusee, nor that any Attornment be made to him. What a man intends to pass to another, he intends to be without it himself, at least for some time, which is not in this Case.

2. The Conusee never becomes actually seiz'd of the Rent, and not only doth not, but never can enjoy the perception of it; for there is no moment of time wherein the Conusors themselves are not actually in Seisin of it, and consequently may distrain if it be in Arrear, and the Conusee can never have actually Seisin, or possibility to have Attornment or distrain, his Seisin being but a mere fiction, and an invented form of Conveyance only.

3. The Conusee's Wife is never dowable of it.

4. It is not subject to any Statutes, Recognizances or Debts of the Conusee.

5. It is never possible to descend to his Heir, for it instantly vests in the Conusors.

6. It can never be Arrear to the Conusee, nor hath he ever a possibility to distrain for it.

To this purpose what is agreed in the L. Cromwell's Case, ^{L. Cromwell's Case, 2 Rep. f. 77.} 2 Rep. is applicable: Then it is to be consider'd what Seisin ^{L. Cromwell's Case, 2 Rep. f. 77.} Perkins had, who was the Conusee of a Fine in that Case; and he had but a Seisin for an instant, and only to this purpose, to make a Render; for his Wife shall not be endowed, nor the Land subject to his Statutes or Recognizances.

Therefore that first Case cited out of the Report of Andrew Ant. 40. Ognell's Case, which I admit to be good Law, hath no resemblance with the present Case, in any circumstance or consequent: but had the Fine been to a third person's use, the consequence had been the same as in the Case cited out of Ognell's Case, not as to the Conusee, but as to that third person to whom the Rent was intended:

To conclude then this first part:

1. That whereof the Conusors were always and separately seized, the same was never by them transferred to the Seisin of another: but of this Rent the Conusors were always in actual Seisin; for there was no moment of time wherein they were not seized; therefore this Rent was never transferred to the Seisin of another, nor could any other for any moment of time have a separated Seisin thereof; for what was mine at all times, could be another's at no time.

Post 41.
Andrew Ognell's Case,
4 Co. 50. b. And therefore I shall agree the Case so much insisted on, which is said to be agreed per Cur' in Andrew Ognell's Case, in Rep. 4. That if a man be seized of a Rent-service or Rent-charge in fee, and grant it over by his Deed to another and his heirs, and the Tenant attorn, such Grantor is without Remedy for the Rent Arrear before his Grant; for distress he cannot, and other Remedy he hath not, because all privity between him and the Tenant is destroyed by the Attornment to the Grantee, and he hath no more Right than any stranger to come upon the Land, after such transferring over of the Rent.

Post 43. I shall likewise agree another Case, That if such Grantee should re-grant the same Rent back to the Grantor, either in fee, in tail, or for life, and the Tenant attorn, as he must to this Re-grant, yet the first Grantor shall never be enabled to distress for Arrears due to him before he granted over the Rent; for now the privity between him and the Tenant begins but from the Attornment to the Re-grant, the former being absolutely destroy'd, and the Tenant no more distrainable for the ancient Arrears, than he was upon the creation of the Rent for Arrears incurred before, till first attorn'd.

If the Case in question prove to be the same in effect with either of these Cases, then the reason of Law for these Cases must sway and determine the Case in question.

And I conceive that there is no likeness or parity between the Case in question and either of those Cases, either for the Fact of the Cases, or the Reason of Law.

I shall therefore begin with comparing this Case with the first of those Cases.

1. In the first of those Cases, he that is seiz'd of the Rent-charge doth intend to transfer his Estate in the Rent to the Grantee, and it is accordingly actually transferred by the Tenant's Attornment to the Grant.

2. The Grantee by his Grant, and Attornment to it, becomes actually seiz'd of the Rent, and may enjoy the benefit of it by perception of the Rent.

3. His Wife becomes domable of it.

4. It is subject to Statutes, Recognizances and Debts entered into by the Grantee, or due from him to the King.

5. It is possible to descend to his Heir.

6. It may be Arrear, and he hath a possibility to distress and abow for it.

1. But in the Case in question, the Conusors of the Fine did never intend to transfer their Estate in the Rent to the Cousee,

2. It is an impossibility in Law, that two men severally shall have several Rights and Feesimples in possession in one and the same Land, simul & semel per Fitzherbert in the Argument of Dyer 28 H. 8. f. 12. a. p. 51. Bokenham's Case; and the same impossibility is so to have of a Rent. Nor hath this relation to the Learning of Instants in Digby's Case, Coke 1 Rep. and Fitzwilliams in Rep. 6.

That an old Use may be revoked, and a new raised in the same time, and an old Possession ended, and a new begun; this is usual in all transmutation of Estates and things also: For in Nature, a new Form introduc'd, doth in the same moment destroy the old, according to that, Generatio unius est corruptio alterius; but a separate Possession can never be in two at the same time, not out of the one, and yet in the other, more than the same Body can be in two several places at the same time.

3. If a Feoffee to use of me and my heirs make a Feoffment to another, without consideration to the use of me and my heirs, notwithstanding there is a new Feoffment, the words of Dyer 28 H. 8. f. 12. b. per Baldwin Ch. Justice. a Use to me and my heirs, yet the Use being the former Use, viz. to me and my heirs, this latter is no new Use given to me, for I cannot have that Use given which I had before; for to give what I had before is no Gift, as is well pres'd by that Book.

And by the same necessity, where I have the possession before, a new possession cannot be really given me by the Statute of 27 H. 8. whose operation is properly to give to him which had not the Possession, but only an Use; the Possession which he wanted before to the Use which he had before, in such manner as he hath the Use.

But here the Statute cannot give the possession to the Conusors which they never wanted, nor the Conusee never had, ad aliquem Juris effectum, tho' perhaps fictitiously, and in order only to a form of a Conveyance, which was not the end or intention of the Statute of Uses; but an Use invented after, that might be made of the Statute, in order to a general form of Conveyance, by which the parties might execute their Intentions, wherein the Conusee is but an Instrument or Proprietary to execute their purpose, as in Cromwell's Case is said; but the Statute brings the new Uses raised out of a feigned possession, and for no time, in the Conusee, to the real possession, and for all times, in the Conusors, which operates according to their intent, to change their Estate, but not their Possession.

Besides,

Besides, it hath been admitted at the Bar, that if the Fine had been levied without consideration, and no Uses express'd, the Conizors might then have distrained for the Arrear, because the Uses were the same as before; which, if granted, it resolves the Question; for the Attornment and power to distrain, follows the Possession, and not the Use: And if after the supposed Possession of the Conusee, and his being seiz'd to the old Uses, when the Statute gives the Possession back to the old Uses, the Conusors might distrain for the Arrears before the Fine, as well as for those after, what hinders their distraining for them still? For the Possession which the Statute gives to the old Uses, is as new a Possession as that it gives to the new Uses, and the privity is the same in both Cases in regard of the Tenant.

And it is common experience, that a Fine levied without Consideration or Use expressed, is to the use of the Conusor and his Peers, who may have an Action of Waste after the Fine, for Waste committed before, as well as he could before the Fine. The instant Possession of the Conusee notwithstanding which, differs not from this Case.

The next Enquiry is, What affinity this Case hath with the ^{Ant. 40.} second Case propos'd? viz. That if one seized of a Rent in fee, grants it over to a stranger and his heirs, and the Tenant attornys; if such Grantee regrants the Rent back to the Grantor and his heirs, there must be a new Attornment of the Tenant to the Re-grant; for the privity by the first Attornment was totally destroyed, and all Arrears of Rent lost when the Tenant attorn'd to the Grantee; which Case I take to be clear Law; for by the Re-grant a total new Estate is gain'd in the Rent, and thereby he who hath the Rent as if he never had any former Estate in it.

And in the present Case, the Estates after the Fine are wholly new, and other Estates in the Conusors, (to which the Tenant never attorn'd) than the Conusors had before the Fine in these respects.

1. Before the Fine, the Husbands had but Estates in Right of their Wives, and now they are Jointenants with their Wives.

2. The Wives before the Fine had Estates of Inheritance absolute, and now they are Jointenants with their Husbands, and among themselves, where Survivorship obtains.

3. The Women were Coparceners before, and the Husbands in Right of their Wives, and they are now all Jointenants.

*Next
case
part*

Sir Moyle
Finch's Case,
6 Rep. £68. b.

4. Two of the Coparceners had the Inheritance of entire third parts, and the two other of one entire third part; and now the four Women and three Husbands are equally Jointenants, which are Estates much differing from the Estates they had before the Fine.

I must agree, That where persons seiz'd of a Rent-charge, by granting it over with Attornment of the Tenant, have totally departed from their Estate, and after retake, either such an Estate as they had before, or a differing Estate in the Rent, they must have a new Attornment, and the former privity is wholly destroyed, and consequently no Arrears can be distrained for, by reason of the first privity, which is not.

But in this Case, the Conusors never were for any moment of time out of possession of their first Estate, nor destroy'd the first privity by any new Attornment, which either was, or possibly could be; but only some have enlarg'd their Estate, some diminish'd it, others alter'd it, without destroying the old privity, which may stand well with the Rules of Law; and consequently they may constrain for Rent Arrear, and abow lawfully, by reason of the first privity still continuing.

And I must observe in this Case, 1. That the Avowants after the Fine are the same persons abowing as before. 2. That after the Fine there is but one common Avowry as before. 3. That there is no new person after the Fine, between whom and the Tenant there was not a privity before the Fine.

That a Man's Estate in a Rent-charge may be enlarg'd, diminish'd, or otherwise alter'd, and no new Attornment or privity requisite to such alteration of Estate.

Litt. Sect. 549. A man seiz'd of a Rent-service or Rent-charge in fee, grants the Rent to another for life, and the Tenant attorns; after the Grantor confirms the Estate to the Grantee in Fee-tail, or Fee-simple: this Confirmation is good, to enlarge his Estate, according to the words of the Confirmation.

Here no new Attornment to this new Estate, which now is Fee-tail or Fee-simple, in the Rent which was before; but an Estate for life is requisite, else the Confirmation were not good; but by Littleton it is good to enlarge the Estate.

2. Sir Edw. Cook in his Comment upon this Case, saith, It is to be observ'd, that to the Grant of the Estate for life, Littleton doth put an Attornment, because it is requisite; but to the Confirmation to enlarge the Grantees Estate there is none necessary, and therefore he puts none. No

Diminishing of Estate.

A man seized of a Rent-charge in fee, grants this Rent for seven years, to commence from the time of his death, the Remainder in fee, and the Tenant attorns in the life-time of the Grantor, as he must by the Resolution in Sir Rowland Hayward's Case, 2 Rep. Here the Grantor hath diminish'd his Estate in the Rent, from a Feesimple to an Estate for life; yet it cannot be doubted but he may distrain for his Rent Arrear.

And so is the Law, where a man seized in fee of a Rent, for a good consideration covenants to stand seized for life, with Remainder over.

Upon these grounds upon Littleton, If a man seized of a Rent-charge in fee, grant it over to a Feme-sole for a term of years, the Tenant attorns, and she take Husband, and during the term the Grantor confirm the Rent to the Husband and Wife for their lives, or in fee, they become Jointenants for life or in fee of this Rent, and need no new Attornment. This Case is proved by a Case in Littleton, Sect.

Where it is manifest, that where a man hath a Rent for which he may once lawfully distrain by Attornment of the Tenant (which gives sufficient privity to above) such Grantee or Possessor of the Rent may enlarge or change his Estate in the Rent to a greater or lesser, or different Estate, and needs no new Attornment or privity; therefore to distrain and above for such Rent whenever Arrear, unless he become dispossessed of the Rent, and the privity to distrain and above thereby, be destroyed by a Right gained by some other to have the Rent, and a Right in the Tenant to pay it to some other.

9 H. 6. c. 43. To this purpose there is a Case, If a Man be seiz'd of Land Br. Avowry, in *Jure uxoris* in fee, and leases the Land for years, reserving Rent; his Wife dies without having had any Issue by him, whereby he is no *Tenant by the Courtefe*, but his Estate is determined; yet he may avow for the Rent before the Heir hath made his actual Entry. This Case is not adjudg'd, but it is much the better Opinion of the Book.

Objections.

Obj. 2. Nor will it serve to say, as is insinuated in Ognell's Case, Ognell's Case, that the Conisors have dispens'd with their own Right in the Arrears, and therefore such Arrears in strictness of Law, when the Fine is levied, are not due at all, but remitted, and so no absurdity to have no Remedy for a thing not due.

1. By this reason a Law should be equally good that provides no Remedy for performance of Contracts, as that which doth, because all Contracts, for performance of which the Law gives no Remedy, shall in Judgment of Law be dispens'd with, releas'd, discharg'd.

2. By this reason a Rent-seck, before Seisin had of it, shall be no Duty, because the Law gives no Remedy before Seisin; and consequently such Rent or such Arrears, as in the present Case, being paid by the Tenant, may be recovered again, as the proper Money of the Tenant, delivered to the Grantee of the Rent without any consideration, upon an indebitat' Assump'st, the Law creating a promise.

So might a Debt paid after six years elaps'd, for which, by the Statute of Limitations, there was no Remedy, yet that doth not cease to be a Debt, as if it had been released.

By like reason, if a man hath by accident had his Bonds burn'd or destroy'd, whereby he had no Remedy to recover the Debt by Law, it should cease to be a Debt at all.

32 H. 8. c. 37. To this the words of the Stat. of 32 H. 8. c. 37. may be added, which gives Remedy for Recovery of such Debts by Executors as were due to the Testators, and for which there was no Remedy before, viz. That the Tenants did retain in their hands such Arrearages of Rents, whereby the Executors could not therewith pay the Debts, and perform the Will of the Testator, &c. And surely no Arrearages could be of Rent, if they were remitted in Law; nor was it fit the Executors should pay the Debts, or perform the Testator's Will with that which was no part of the Testator's Estate, either in Possession, or as a Credit.

7 H. 8. c. 4. If a common Recovery had been to Uses of Lordships and Manors before the Stat. of 27. the Recoverors had no remedy to make the Tenants attorn (for a quid Juris clamat would not lie upon a Recovery) before the Stat. of 7 H. 8. c. 4. which did give Remedy, and which saith, That such refusal of Attornment was to the great offence of their Conscience refusing, and not only to the disinheritance of the Recoverors, but often to the breaking of the last Will of the Recoverees, and also to the disinheritance of Husbands, Wives, and others to whose use the Recovery was had. By which it is plain, that Duties for which there

But since the Statute, if a Fine be levied of a Reversion of Lands to Uses, or of a Rent, because the Use and Possession by the Statute come instantly together, and the Conusee of the Fine hath no time possible to bring either a quid Juris clamat, or a quem redditum reddit, for, or to receive an Attornment, to perfect his Possession. It was resolved in Sir Moyle Finch's Case, Co. 6. f. 68. 2. that the Cestuy use should notwithstanding distrain, and have the same Advantage as if the Conusee's Possession had been perfected by Attornment and Seisin.

The intent of the Stat. of 27. which was to bring together the Possession and the Use, when the Use was to one or more persons, and the Possession in one or more other separate persons, was soon after the Statute wholly declined, upon what good Construction or Inference I know not.

For now the Use (by the name of Trust, which were one and the same before the Statute) remains separately in some persons, and the Possession separately in others, as it did before the Statute, and are not brought together but by Decree in Chancery, or the voluntary Conveyance of the Possessor of the Land to Cestuy que Trust.

So as now the principal use of the Stat. of 27. especially upon Fines levied to Uses, is not to bring together a Possession and Use, which at no time were separate the one from the other, but to introduce a general form of Conveyance, by which the Conusors of the Fine, who are as Donors in the Case, may execute their intents and purposes at pleasure, either by transferring their Estates to strangers, by enlarging, diminishing, or altering them, to and among themselves, at their pleasure, without observing that rigor and strictness of Law for the Possession of the Conusee, as was requisite before the Statute.

Which I have sufficiently evidenc'd, by shewing that the Attornment of the Lessee to the Conusee or Reversioner, or of the Tenant to him, as Grantee of the Rent-charge, is now dispensed with, which was not before the Statute.

For if that were now requisite, the Conusors could not only not distrain for the Rent due before the Fine, but not for the Rent due since the Fine; nor doth the Statute help the matter, because the Cestuy que use is in possession of the Rent by the Statute, and therefore needs no Attornment; for that is true, when the Conusee hath a perfect possession, but without Attornment the Conusee had no perfect possession empowering him to distrain; and therefore the Statute can bring no perfect Possession to the Uses to that end.

And

L. Cromwel's Case, 2 Rep. f. 72. b. To make a Rent arise out of the Estate of Cestuy que use upon a Recovery, which was to arise out of the Estate of the Recoverer and his possession; which is a principal point in Cromwell's Case, and resolved, because by the intention of the parties, the Cestuy que use was to pay the Rent.

14. Eliz. Har-
well verf. Lu-
cas. Moore's
Rep. f. 99. a.
n. 243. Bracebridge's Case is eminent to this purpose. Tho. Bracebridge seiz'd of the Manor of Kingbury in Com Warwick, made a Lease for one and twenty years of Birch-in-Close, parcel del Manor, to Moore; and another Lease of the same Close for six and twenty years, to commence at the end of the first Lease, to one Curteis, rending Rent, and after made a Feoffment of the Manor and all other his Lands to the use of the Feoffees, and their heirs and assigns, upon condition that if they paid not 10000 £ within fifteen days to the said Tho. Bracebridge or his Assigns, they should stand seized to the use of Bracebridge and Joyce his Wife; the Remainder to Thomas their second Son in Tail, with divers Remainders over; the Remainder to the right Heirs of Thomas the Father. Livery was made of the Land in possession, and not of Birch-in-Close, and no Attornment. The Feoffees paid not 10000 £. whereby Bracebridge the Father became seiz'd, and the first Tenant for years attorn'd to him. Adjudged,

1. That by Livery of the Manor Birch-in-Close did not pass to the Feoffees without Attornment.
2. That the Attornment of the first Lessee was sufficient.
3. Though the Use limited to the Feoffees and their heirs was determined before the Attornment, yet the Attornment was good to the contingent Use, upon not paying the Money.

Moore & 99.
n. 243.

In the Resolution of this Case, Wild, Archer and Tyrrel, Justices, were for the Plaintiff; and Vaughan, Chief Justice, for the Defendant.

Trin:

said James White, who was admitted, instituted and indued, tempore pacis, &c.

That the said James White being so Rector of the said Church, and the said Richard Jervis seized of the said Manor to which the said Advowson pertained, &c. the said Richard after, at Norfield aforesaid, died so seized.

After whose death, the same descended to one Thomas Jervis Esq; as Son and Heir of Richard, and from him descended to one Sir Thomas Jervis Kt. who entred and was seized, and so seized, the said Sir Thomas Jervis, March 30. 14 Car. 1. by his Deed in writing, sealed at Norfield aforesaid, granted to one Phineas White the Advowson of the said Church, for the first and next Avoidance only, whereby the said Phineas was possessed for the next Avoidance of the said Advowson, and so possessed, the said Church became void by the death of the said James White, which was the first and next Avoidance after the said Grant to Phineas.

Phineas, by virtue of his said Grant, presented one Timothy White his Clerk, who was thereupon admitted, instituted and indued, tempore pacis tempore Car. 1.

The said Timothy being Rector, and the said Sir Thomas Jervis seized as aforesaid, the said Sir Thomas died seized at Norfield aforesaid, and the said Manor, with the Appurtenances, descended to Thomas the Defendant, as his Son and Heir, who entred, and was, and yet is seized; and being so seized, the said Church became void by the death of the said Timothy White, and the said Thomas Jervis the Defendant presented the other Defendant John Hunckley, who was admitted, instituted and indued long before the Writ purchased.

Then traverseth *absq; hoc*, That the late Queen was seized of the said Advowson, with the Chapel of *Coston* aforesaid, in gross, and as of fee, *Quare Corona sua, Et hoc paratus est verificare*; and demands Judgment *si Actio*.

John Hunckley the Incumbent taking by Protestation, That the late Queen was not seized, nor presented, as by the Declaration is supposed: for Plea saith, That Richard Jervis was seized of the Manor of Norfield, with the appurtenances, in Com pdict, and the Advowson of the said Church appertained thereto; and pleads the same Plea verbatim as to the Queens Presentation of White, and all other things, as Jervis the Patron pleaded, and the Presentation of himself, and that he was by the Presentation of the other Defendant Jervis, admitted, insti-

Imperfections in the Pleading.

1. Upon this Quare Impedit brought, there is a good Title to present surmis'd for the King, but no more: and there is much difference between a Title appearing for the King, and suppos'd only.

2. The Defendant by his Plea in Bar hath not well traversed the King's Title, for it is traversed but in part, for only the Seisin of the Advowson in the Queen is traversed, whereas properly the Seisin and Presentation of the Queen, by reason of her Seisin, ought to have been traversed, by Absque hoc, That the Queen was seized of the Advowson in gross, and presented.

Mod. 281.
Post 57.

3. The Seisin of the Advowson, which makes not a Title alone, nor is not either traversable or inquirable by the tender of a Demi-mark in the King's Case, in droit d'Advowson, is not traversable neither alone in a Quare Impedit: But no Demurrer being thereupon, nor no Issue taken upon that Traverse, no more shall be said of it.

4. The King may alledge Seisin, without alledging any time (as Sir Edward Coke saith) in a droit d'Advowson.

5. The Defendant's Traverse was not necessary, because he had confessed and avoided the Queens Presentation, by saying it was by lapse, if the Defendant had rested upon avoiding the Queens Presentation.

6. The Attorney-General ought to have maintained his Count, and traversed the Queens Presentation by lapse.

7. He doth not do so, but deserts making the King's Title appear, and falls upon the Plaintiff's Title, That the Advowson was not appendant.

8. He offers a double Issue, That the Presentation of Phineas White was by Usurpation, and the Advowson not appendant to the Manor.

Certain

Certain Premisses.

If a man counts or declares fit a Quare Impedit, That he, or his Ancestors, or such from whom he claims, were seized of the Advowson of the Church, but declares of no Presentation made by him or them, such Count or Declaration is not good, Ant. 56. and the Defendant may demur upon it; so is the express Book following.

1. A man shall not have a Quare Impedit, if he cannot al-
ledge a Presentation in himself, or in his Ancestor, or in another
person through whom he claims the Advowson, and that in
his Count, unless it be in a special Case. Then puts that spe-
cial Case, As if a man at this day, by the King's Licence,
makes a Parochial Church, or other Chantry, which shall be pre-
sentable, if he be disturbed to present to it, he shall have a
Quare Impedit, without alledging any Presentation in any per-
son, and shall count upon the special matter.

And the Law in this, is the same in Case of the King with Ant. 56.
a Common Person, by all the Books and Presidents in the Books
of Entry.

To this add the L. Hobart's Judgment, which is always ac-
curate for the true reason of the Law. Know, That tho' it be
true that a Presentation may make a Fee without more, (as a
Presentation by Usurpation doth) that you never have a Decla-
ration in a Quare Impedit, that the Plaintiff did present the last L. Hob. Dig.
Incumbent, without more: but you declare, that the Plaintiff by's Case,
was seized in fee, and presented, or else lay the Fee-simple in
some other, and then bring down the Advowson to the Plain-
tiff, either in fee, or some other estate. f. 101.

The reason is, That the Presentation alone is militant and in-
different, and may be in such a Title as may prove that this
new Avoidance is the Defendant's; and therefore you must lay
the Case so, as by the Title you make, the Presentation past
join'd to your Title, shall prove that this Presentation is likewise
yours, as well as the last.

Whence it follows, that to count of an Estate and Seisin 2 Mo. 185.
without a Presentation, or of a Presentation without an Estate,
are equally vicious and naught, be it in the Case of the King,
or of a Common Person, and was never in Example of Pre-
sident.

2. A second necessary Premise is this, and is both natural and manifest: When you will recover any thing from me, it is not enough for you to destroy my Title, but you must prove your own better than mine.

Cannington
Ant. 7.

Litchfield

Grot. de Jur.
jus. c. 81. Belli 603.

Hob. f. 162.
Colt & Glo-
ver's Case ad
finem paginae.

Hob. Digby
ver. Fitzn.
f. 103, 104.

Post 60.
Mod. 278.
Ant. 8.

Mod. 277.

Rastal 1. Intr.
f. 484. a. b.
Ant. 8.

For it is not rational to conclude, You have no Right to this, and therefore I have; for without a better Right, melior est conditio possidentis regularly.

3. Every Defendant may plead in a Quare Impedit the General Issue, which is ne disturba pas, because that Plea doth but defend the wrong wherewith he stands charg'd, and leaves the Plaintiff's Title not only uncontroverted, but in effect confess'd; and the Plaintiff may, upon that Plea, presently pray a Writ to the Bishop, or at his choice maintain the Disturbance for Damages.

But if a man will leave the General Issue, and controvert the Plaintiff's Title, he must then enable himself, by some Title of his own, to do it; but yet that is not the principal part of his Plea, but a formal Inducement only: And therefore there is no sense, if you will quarrel my Possession, and I to avoid your Title effectually, do induce that with a Title of my own, that you should fly upon my Title, and forsake your own; for you must recover by your own strength, and not by my weakness.

The Lord Hobart goes further in giving the reason of this course of Pleading, in Colt and Glover's Case, in the place before cited: Of this form of Pleading in Law, there is one reason common to other Actions, wherein Title is contained to the Land in question specially, which is, that the Tenant shall never be received to counter-plead, but he must make to himself, by his Plea, a Title to the Land, and so avoid the Plaintiff's Title alledg'd by Traverse, or confessing and avoiding.

But in the Quare Impedit there is a further reason of it, for therein both Plaintiff and Defendant are Actors one against another; and therefore the Defendant may have a Writ to the Bishop as well as the Plaintiff, which he cannot have without a Title appearing to the Court; And so are the Presidents, when a Quare Impedit is brought against the Patron for disturbance of his Clerk, not being in possession.

The Law in Case of a Common Person.

Mod. 277. If a Common Person bringgs a Quare Impedit, and counts his Title to present, and that he is disturbed: the Defendant, to counter-plead the Plaintiff's Title, makes (as he must) a Title to himself to present, and confesses and avoids, or traverseth the Plaintiff's Title.

Ant. 58. 1. The Plaintiff shall never desert his own Title, and by falling upon, and controverting the weakness only of the Defendant's Title, ever recover, or obtain a Writ to the Bishop, tho' the Defendant's Title do not appear to the Court to be sufficient, for the unanswerable Reasons given by the Lord Hobart in the first place.

2. If you will recover any thing from another man, it is not enough for you to destroy his Title, but you must prove your own better than his.

3. There is no sense, if you will quarrel my Possession or Right, and I, to avoid your Title effectually, either by traversing it, which is denying, or confessing and avoiding it, do induce that with a Title of mine own, that you should fly upon my Title to impeach it, and forsake your own, as I said before.

4. Cho' I should, being Plaintiff, make it appear to the Court, that the Defendant's Title is not good, but no way making it appear that my own Title is good: what inducement can the Court have to judge for me, and against the Defendant, when no more Right appears for the one than the other, and not only so, but no Right appears for either? For in such case sure, Melior est conditio possidentis, I ought not to be sued by him I have not wrong'd; and he that hath no Right, can suffer no Wrong.

5. It is to no end the Plaintiff should set forth any Title at all, if he be not to make it good, but it should serve his turn only to impeach the Defendant's Title, and conclude so unreasonably, That if I can make it appear the Defendant hath not a good Title, therefore I have, and must have Judgment for me.

How

Wherein the Law differs in the King's Case from
a Common Person's Case.

But it must be agreed there are Cases in which the King may desert his own Title, and not join Issue upon the Defendant's traversing the King's Title, or avoiding it, but traverse the Title made by the Defendant in his Bar, which is directly taking a Traverse upon a Traverse, which regularly a

Long 5 E. 4. Common Person cannot do; nor I think in any Case, but in Waste for cutting som-
any Trees, and selling them. 5 E. 4. Hob. Digby & Fitzherbert's Case, and Woodroffe & Cod-
f. 100. b. ford's Case, 37 Eliz. Hob. f. 105.

13 E. 4. f. 8. a. 3 H. 7. f. 3. Keilw. 192. a. Stamford Prerog. f. 64. b. The King counting of a Title to himself by Office found, or by other matter of Record, which is another thing than only surmising a Title, as in the Case at Bar, may chuse to maintain his own Title found by Office, and traversed by the Defendant, or otherwise appearing of Record, and take a Traverse to the Title made by the Defendant.

The Reason is manifest; for the Office of it self is a Title appearing for the King, and he shall never lose his Possession, having a Title, but where the Defendant's Title doth appear a better. But what is this, that the King should relinquish his own Title only surmis'd, and controvert the Defendant's, whose Title, tho' it should appear naught, leaves no Title in the King? But when an Office is found, or a Title for the King appears by other matter of Record, if the Defendant hath no Title, the King hath one by his Office, or other Record.

So is 13 E. 4. f. 8. and many other Books. Mod. 276.

Some Books, prima facie, seem to make for that Opinion, That the King may generally desert his own Title, and take a Traverse to the Defendant's.

Br. Prerog. pl. 65. 7 E. 6. Brook tit. Prerogative, Pl. 65. Where a man traverseth the Office of the King, and makes to himself a Title (ut oportet) Traversing the Title of the King contained in the Office, the King may chuse to maintain his own Title, or to Traverse

That Case is likewise in Br. and cited to be as in 34 H. 8. whereof there is no Year-Book, neither some four years before the last Case I mentioned. It is thus:

Nota, by Whorhood Attornat' Regis, & alios, When an Information is put into the Chequer upon a Penal Statute, and the Defendant makes a Bar, and traverseth, That there the King cannot waive such Issue tender'd, and traverse the former matter of the Plea, as he can upon Traverse of an Office, and the like, when the King is sole party, and intitled by matter of Record; for upon the Information there is no Office found before, and also a Subject is party with the King for a moiety. Quod nota bene.

Here it is most apparent, That upon an Information, when the King hath no Title by matter of Record, as he hath upon Office found, the King cannot waive the Issue tender'd upon the first Traverse, tho' the Information be in his own Name; which disaffirms the second Case in that point. And for the supernumerary Reason, That the King is not the sole party in the Information, it is but frivolous, and without weight; but the stress is where the King is sole party, and intitled by matter of Record.

I shall add another Authority out of Stamford Prerogative.

If the King be once seized, his Highness shall retain against all others who have not Title, notwithstanding it be found also that the King had no Title, but that the other had possession before him, as appeareth in 37 Ass. p. 35. which is Pl. 11. where it was found, that neither the King nor the Party had Title, and yet adjudged that the King should retain; for the Office that finds the King to have a Right or Title to enter, makes ever the King a good Title, tho' the Office be false, &c. And therefore no man shall traverse the Office, unless he make himself a Title; and if he cannot prove his Title to be true, altho' he be able to prove his Traverse to be true, yet this Traverse will not serve him.

It is to be noted, That the King hath a Prerogative which a common person hath not; for his Highness may chuse whether he will maintain the Office, or traverse the Title of the Party, and so take Traverse upon Traverse.

It

Hill. 21 & 22 Car. 2. C. B. Rot. 606.

Thomas Rowe Plaintiff, and Robert Huntington Defendant,
in a Plea of *Trespass* and *Ejectment*.

The Plaintiff declares, That Thomas Wife, 1 April, 21 Car. 2. at Hooknorton in the County of Oxford, by his Indenture produc'd, dated the said day and year, demised to the said Thomas Rowe the Manor of Hooknorton, with the Appurtenances, 4 Messuages, 100 acres of Land, 50 acres of Meadow, 400 acres of Pasture, and 50 acres of Wood, with the Appurtenances, in Hooknorton aforesaid: As also the Rectory and Vicarage of Hooknorton, and the Tithes of Grain, Hay and Wool, renewing in Hooknorton aforesaid; To have and to hold the premisses from the Feast of the Annunciation of the Virgin then last past, to the end and term of seven years then next ensuing.

That by virtue thereof, the said Thomas Rowe the Plaintiff into the said Manor and Tenements entred, and of the said Rectory, Vicarage and Tithes was possessed.

That the said Robert Huntington the Defendant, the said first day of April with force and arms, into the said Manor, Rectory, Vicarage and Tithes entred, and him ejected, against the Peace, to his great damage, and whereby he is endamaged 100l.

The Defendant Huntington pleads Not Culpable; And thereupon Issue is join'd.

The Jury give a Special Verdict, That as to the *Trespass* and *Ejectment* in the said Manor and Tenements, and in the said Rectory, Vicarage, and Tithes aforesaid, excepting 200 acres of Pasture, parcel of the said Manor of *Hooknorton*, That the Defendant *Huntington* is not culpable; And as to the said 200 acres, they say, That long before the said *Trespass* and *Ejectment*,

That is, the 14th day of October, 1 Mar. one *Robert*, then Bishop of *Oxford* was seized in his Demesne, as of Fee, in Right of his Bishoprick, of the said Manor, whereof the said 200 acres are parcel, and so seized the said 14th of October, 1 *Mariae*, at *Hooknorton*

To have and to hold the said Farm or Manor, and all other the premisses, with the Appurtenances, except before excepted, to the said *Croker*, his Executors and Assigns, from the Feast of the Annunciation of our Lady last past before the date of the said Deed indented, for the term of Eighty years, rendring to the said Abbot, Covent, and their Successors yearly, during the said term.

For the said Manor and Farm 9*l.* For the said Parsonage 2*2l. 2s.* For the Common of Sheep, Hay, and Custom-works of *Brown-Mead* 5*l.* For the Wool 12*l.* For *Prestfield* 6*l. 13s. 4d.* For the Vicarage 6*l. 13s. 4d.* of lawful Money, &c. at the Feast of S. *Michael* the Archangel, and the Annunciation of our Lady, by equal portions, as by the same Deed indented, amongst divers other Covenants and Grants, more plainly appeareth.

And where also the said Bishop, by his other Deed indented, dated 8 *October*, 1 *Edw.* 6. hath demised, and to farm lett, unto the said *John Croker*, all that his Manor of *Hooknorton* aforesaid, Lands, Tenements, Meadows, Leasows, Pastures, Feedings, Commons, Waste Grounds, Woods, Underwoods, Waters, Mills, with all Messuages, Tofts, Cottages, Orchards, Curtilages, Courts-Leets, Fines, Herriots, Amerciaments, Franchises, Liberties, Rents, Reversions, Services, and all other Hereditaments whatsoever they be, set, lying and being in *Hooknorton* aforesaid, in the said County, with the Appurtenances.

Except certain Lands and Tenements in the said Town, in the tenure of the said *John Croker*, for certain years then enduring.

To have and to hold all the said Manor of *Hooknorton*, and all other the premisses, with the Appurtenances, except before excepted, to the said *John Croker* and his Assigns, from the Feast of St. *Michael* the Archangel last past before the date of the said latter Deed indented, to the full end of the term of Ninety years from thence next ensuing.

Rendring to the said Bishop and his Successors yearly during the said term, 11*l. 4s. 9d.* at the Feasts of the Annunciation and St. *Michael* the Archangel, by equal portions, as by the said latter Deed, among other Covenants and Grants, more plainly appears.

The Reversion of all which premisses are in the said Bishop, and to Him and his Successors do belong, as in Right of his Church.

Now

They further find, That the Rent for all the said demised premisses, reserved by the said Indenture for one whole half year, ended at the Feast of St. Michael the Archangel, 1643. was behind and unpaid ; and that *Robert*, late Bishop of *Oxford*, the 29th and 30th day of *December*, 1643. into the Parsonage-house then, and by the space of forty or fifty years before, reputed and called the Manor-house ; and that he then, at the said Parsonage-house, by the space of one hour next before the Sun-setting of both the said two days, remained and continued, until, and by the space of one hour after Sunsetting of both days, demanding, and then did demand the Rent for the half of the year aforesaid.

They further say, That there was no sufficient Distress upon the premisses at the time of the demand of the said Rent thereupon ; And that the said Bishop, the said 30th day of *December*, 1643. aforesaid, into the said premisses entred.

They further say, That all the Right, State, and Title, Term of Years, and Interest of and in the Manor, Tenements, Rectory, and other the said premisses, by virtue of the said Indenture of Demise by the said late Bishop, as aforesaid, granted to the said *John Croker*, by mean Assignments, came to the said *Thomas Wise*.

That by virtue of the said several Assignments, the said *Thomas Wise* afterwards, the 4th of *January*, 1667. into the premisses entred, and was possessed for the residue of the term of Years, *prout Lex postulat*. That he so possessed, afterwards, the said first day of *April*, 21 *Car. 2.* at *Hook Norton* aforesaid, demised to the said *Thomas Rowe* the said Manor and Tenements, Rectory and Vicarage, whereof the said two hundred acres are parcel.

To have and to hold, to the said *Rowe* and his Assigns, from the Feast of the Annunciation last past, for the term of seven years then next ensuing. That by virtue thereof the said *Rowe* entred, and was possessed, until the said *Robert Huntington*, the said first of *April*, 21 of the King, by Force and Arms, by the command of the foresaid *Robert* late Bishop of *Oxford*, into the said two hundred acres, upon the possession of the said *Thomas Rowe*, to him demised by the said *Wise*, as aforesaid, for the said term, not yet past, entred and ejected him. But whether upon the whole matter, the said *Robert* be culpable of the said Trespass and Ejectment, they refer to the Court.

Then in the Clause of Re-entry for Nonpayment, it is, That the Re-entry should be into such of the premisses whereupon such Rent being behind was reserved; therefore not into all the premisses.

Whence it follows, that there being several Rents, several Demands were respectively to be made before Re-entry, as well for those reserved in the first Indenture, as for that in the second Indenture recited.

And it being found, that the Demand made by the Bishop at the Parsonage-house in 43. was for the half-years Rent reserved of all the premisses demised by the Indenture of 1 Mar. it follows, that more Rent was demanded than was payable in any one place, consequently the Demand not good, nor the Re-entry pursuing it; And thus far the Case is clear against the Defendant; for the Lease of 1 Mar. could not be avoided by that Re-entry, in all, nor in part, if the Leases of 29 H. 8. and 1 E. 6. were well and sufficiently found by the Jury to have been made.

Note, The Jury finding that the Rent reserved for all the premisses was behind for half a year, ending at Michaelmas, 1643. not expressing the Sum of the Rent, is no more than to find, that no Rent was paid for the said half year.

And their finding, that the Bishop did demand the said half years Rent, finding no Sum by him demanded, is no more than to find, that he demanded such Rent as was due for the said half year. So as notwithstanding the Juries finding, that no Rent was paid for the said half year, and their finding of the Bishop's demanding of what was due for the said half year, it doth not therefore follow, that they find any Rent to be reserved by the said Lease of 1 Mar. or that there was a Demand of any Rent admitted to be so reserved.

But if the Leases of 29 H. 8. and 1 E. 6. be not well and sufficiently found by the Jury to have been made, the Consequent then is, that in Law there are no such Leases; for, *de non apparentibus, & non existentibus, cadem est ratio ad omnem juris effectum.*

And then it follows, that the Lease of 1 Mar. of all the premisses specified in the Indenture of 29 H. 8. and of all specified in the Indenture of 1 E. 6. for 90 years, habendum from the respective expirations of the terms specified, and under the respective Rents reserved by those Indentures, will be void as to the terms intended to be granted, and the Rents reserved, because the beginning of the Terms, and particulars of the Rents, can

So as the sole Question is reduced to this, Whether by this Verdict the Jury have well and sufficiently found any Leases 29 H. 8. and 1 E. 6. or either of them, were made to Croker?

1. And it seems clear, that the Jury have not in express terms, and positively found, either of those Leases to have been made, for then they must have found that the Abbot Commendatory of Osney, and the Covent there, had made such Lease to Croker, dated 29 H. 8. &c. And in like manner, that the said Abbot being then Bishop of Oxford, had made 1 E. 6. a Lease to Croker for such a term of years, and under such Rents and Reservations, &c. But there is no such finding in this Verdict.

2. The second Inquiry is, Whether the Jury having found (as they have) that the then Bishop of Oxford did by Indenture, dated 1 Mar. lease to Croker the Manor of Hook Norton for Ninety years, which Indenture they find in hæc verba, in which there is a recital of a Lease made 29 H. 8. and of another 1 E. 6. to the said Croker, (but neither in hæc verba) be not a good and sufficient finding of such recited Leases to have been actually made, because recited in the Lease of 1 Mar. which is expressly found to have been made?

But certainly, it can never follow that the reciting of the Deeds of 29 H. 8. and 1 E. 6. to have been made in the Deed of 1 Mar. which is expressly found to have been made, is a sufficient finding of those two other Deeds to have been actually, and re vera made; for the strange consequence of that would be,

1. That no Deed really sealed and delivered between the parties to it, and so agreed to be, could make recital of a thing which was false, or which was not according to the recital, which is a senseless Assertion.

2. By that reason all Fables recited, nay, all sorts of recited Lies, (at least all such as had possibility of being true) would become Truths, whether orally recited, or in Books, Letters, or other Writings; for the difference of recital any other way, and recital in a Deed, will not vary the Case, because the recital in a Deed may as equally be false as in other ways of recital; unless a man think that any false recital in a Deed shall be a conclusion against the parties, and such as claim from them; which I anon shall make appear to be false.

Post 82.

Post 82.

3. It

Which finding only of the Deed of 1 Mar. verbatim, and that thereby the Manor of Hooknorton was demised for 90 years, à fine prioris dimissionis, in the Indenture of 1 Mar. mentioned, it cannot be made out by any rational inference, that they have clearly found such a former Demise, or otherwise than as recited to have been by the Indenture of 1 Mar.

For to find that such a Letter was written, or such a Book made by J S. is not to find that all things, or any thing contained or mentioned in that Letter or Book are or is true.

No more finding a certain Deed, as that of 1 Mar. to be sealed and delivered by J. S. is not a finding that every thing mentioned or recited in that Deed is true.

The Context of the Verdict explained.

I find it conceived by some, that by the words of the Verdict, *Habendum à fine prioris dimissionis in Indentura p̄dicta* mentioned, the Jury have found two things.

The first from the words, *Habendum à fine prioris dimissionis*, That there was a former Demise, from the expiration of which the term granted 1 Mar. begins.

The second from the words, *In Indentura p̄dicta* mentioned, That such former Demise is mentioned in the Indenture of 1 Mar.

And thence conclude, That a former Demise, mentioned in the Indenture of 1 Mar. is by the Jury found to have been actually made; and consequently the sense of the words of the Verdict, and Jury's meaning must be, as if they had been *Habendum* from the expiration of a former Demise, and which former Demise is mentioned in the Indenture of 1 Mar.

But surely there is a clear difference between the Juries finding a former Demise to be, and their finding a former Demise mentioned to be: for a former Demise may be found mentioned to be, which notwithstanding never was.

The words therefore of the Verdict, genuinely read and expounded, are, *Habendum* from the expiration of a former Demise (not which positively was) but *Habendum* from the expiration of a former Demise mentioned in the Indenture of 1 Mar. to be.

And consequently, the Deed it self being syllabically found, the Court is not to regard their Collection of the purport of it.

2. Another reason is, That if those words in the Verdict, Habendum from the end of a former Demise mentioned in the said Indenture, had been omitted, and they had only found the Bishop had sealed and executed the Indenture 1 Mar. to Croker, Cujus quidem Indent' tenor sequitur in *hæc verba*, &c. all that is pretended to be found by this Verdict had been as fully, and more clearly found, by finding the Indenture of 1 Mar. only.

For finding that Indenture in *hæc verba*, they had found that the Bishop had demised the Manor of Hooknorton, Habendum from the expiration of a former Demise therein mentioned, for Ninety years; which is all they have now found: Therefore the finding by way of redundancy, over and besides finding the Deed it self, what was equally found in finding the Deed only, is not to be regarded, but as over-doing and impertinent.

3. Besides, such a Construction of the Verdict makes it absolutely equivocal and uncertain; for if the words, Habendum à fine prioris dimissionis in Indentura pdict' mentionat, be but their Summary Collection of what the Indenture, 1 Mar. contains, then it is but finding a recital of a former Demise; but if otherwise, it is finding a former Demise really and positively, which *do toto caelo differre*, and confound the Judgment of the Court.

4. Put the case any other person, having seen the Deed of 1 Mar. should be asked, What the effect of it was? his Answer would be, as the Jury have found, That it was a Demise by the Bishop of Oxford to Croker, of the Manor of Hooknorton, and other things, Habendum for Ninety years, from the expiration of a former Lease mentioned in that Demise.

But such Answer did not assert, That there was actually such a former Demise, as is mentioned in that Deed of 1 Mar.

Why then must the Jury, asserting but the same thing in the same words, be strained to assert more, viz. That there actually was such a former Demise as is recited in the Indenture 1 Mar.

Ant. 73.

But now for Authority, I will resume the Case formerly cited of 3 E. 6. in the Lord Brook. If A. makes a Lease to B. Habendum for Forty years from the expiration of a former Lease made of the premises to J. N. and this be found occasionally, by Special Verdict, as our Case is: but the Jury in no other manner find any Lease to be made to J. N. than as mentioned in the Lease to B. By the Resolution of that Book, the Lease to B. for Forty years shall begin presently.

And who will say in this Case, That because the Jury find a Lease made to B. for Forty years, Habendum from the expiration of a former Lease made to J. N. that therefore they find a Lease formerly made to J. N. when in truth J. N. had no such Lease; for they only find what the Habendum in the Lease to B. is, which makes a false mention of a former Lease to J. N. but had no Evidence to find a Lease which was not.

Exactly parallel to this is our present Case: The Jury find, the Bishop of Oxford, by a Lease dated the 14th of October, 1 Mar. demised to Croker the Manor of Hook Norton, Habendum to him and his Assigns for Ninety years from the expiration of a former Demise mentioned in the said Indenture of Lease 1 Mar. But do not affirm or find, explicitly or implicitly, any former Demise made, when they only find summarily the Habendum of the Lease 1 Mar. which mentions such a former Demise.

Cr. 10 Car. 1.
f. 397.

Another Case I shall make use of, is, the Case of Miller and Jones versus Manwaring, in an Ejectment brought in Chester, upon the Demise of Sir Randolph Crew: The Jury in a Special Verdict found, That John Earl of Oxford and Elizabeth his Wife, were seized in Fee, in Right of Elizabeth, of the Manor of Blacon, whereof the Land in question was parcel, and had Issue John: The said John Earl of Oxford, by Indenture dated the Tenth of February, 27 H. 8. demised the Manor to Anne Seaton for Four and Thirty years; Elizabeth died 29 H. 8. and the said Earl of Oxford died March 31 H. 8.

After-

So in our present Case, the Jury finding that the Bishop of Oxford, 1 Mar. did demise the Manor of Hook Norton to John Croker, Habendum for Ninety years from the expiration of a former Demise mentioned in the Indenture of 1 Mar. is not a finding of any such former Demise to be made, but a finding that in the Indenture 1 Mar. it is suggested there was such a former Demise, and no more.

And if any man shall object, That in Rochester's Case the reason why no such Lease is found to be made to Anne Seaton in 28 H. 8. to be, because it is found that the Lease made to Anne Seaton was in 27 H. 8. that is not to the purpose, because the Jury might find, and truly, that a Lease was made to her, dated the 10th of February, 27 H. 8. but that was no hindrance but that another Lease was made to her in 28 H. 8. as is mentioned in Rochester's Lease, which had been a Surrender in Law of that made in 27 H. 8.

Therefore it is manifest, That the sole Reason why no such Lease was admitted to be in 28 H. 8. is no other than because the Jury find no such to have been made, but find a suggestion of it only in Rochester's Lease: And it is the same exactly in our present Case.

The third thing deducible from the Case, is, That a Demise by Indenture for a term, Habendum from the expiration of another recited or mentioned term therein, which is not, 35 H. 6. 34 Br. (or not found to be, which is the same thing) is no Estoppel tit. Faits, p. 4 or Conclusion to the Lessee or Lessor, but that the Lessee may 12 H. 4. 23 Br. enter immediately, and the Lessor demise or grant in Reversion Faits, 21. Ant. 74.

There is another Case, resolved at the same time, between the same persons, and concerning the same Land, and published in the same Report, and specially found by the same Jury. Edward Earl of Oxford, Son of John, the Son of John Earl of Oxford, by Indenture between him and Geoffrey Morley, dated the Fourteenth of July, 15 Elizabethæ, reciting, That John his Father, by Indenture the Thirtieth of July, 35 H. 8. had demised to Robert Rochester the said Farm or Manor of Blacon, Habendum for Thirty years, from the end or determination of the Lease made to Anne Seaton, the Tenth of February, 27 H. 8. which is a false recital; for the Lease to Rochester was to commence from the end or determination of a Lease made to Anne Seaton, that is recited to be made the Tenth of February, 28 H. 8. and that after-

And for that Morley's Lease was to commence after the Lease granted to Rochester, which was to commence after that granted to Seaton, February 10. 27 H. 8. whereas no such Lease was granted to Rochester, but a Lease to commence after one granted to Seaton in 28 H. 8. it was resolved, None of those Leases were in esse, and that Morley's Lease commenced therefore presently.

The words of the Resolution are these, as to Morley's Lease. It was resolved, that Morley's Lease was not *in esse*, for that misrecites the former Leases, and so hath the same Rule as the former, where it recites Leases, and there be none such: therefore it shall begin from the date, which being in the 15th of the Queen, for 50 years, ended 1623. which was before the Lease made to the Plaintiff. For these Reasons Judgment was affirmed.

The same Conclusions are deducible from this Lease to Morley, as from the former to Rochester, and therefore I will not repeat them. But here are two Judgments in the very point of our Case, and affirmed in a Writ of Error unanimously in the King's-Bench.

And where it is thought material that the Jury have found a half-years Rent to have been behind at Michaelmas, 1643. and thence inferred the Jury have found the Leases by which that Rent was ascertained, namely, the Leases of 29 H. 8. and 1 E. 6.

Surely if a Lease be for a term of years, to commence from the end of a former term, and for such Rent as is reserved upon such former Demise that never was; as no term can commence from the end of another which never was, so no Rent can be behind, which cannot appear but by a Demise which was never made, that is, which is never found to be made.

And further, That if the Jury had found the Leases of 29 H. 8. and 1 E. 6. to have been made, as is mentioned in the Lease of 1 Mar. that had not been a sufficient finding of them.

For a Deed is not found at all, nor a Last Will, when only the Jury find but part of the Deed or Will; for the Court cannot judge but upon the whole, and not upon part.

If it be found in Assize the Defendant was Tenant, and disseized the Plaintiff, nisi verba contenta in ultima voluntate W. M. give a lawful Estate from W. M. to R. M. and find the words contained in the Will, but not the Will at large; the Court cannot judge upon this Verdict, whose Office it is to judge upon

On ~~so~~ ^{so} instance, The Jury said the Manor Demised for Ninety years, Habendum from the end of a former Demise mentioned in Mar. This Verdict in it self, makes no accommodation of the term, by not finding from the expiation of which term it begins, nor said no Rent reserved. But the Demise of Mar. as to them, must be made out from the recitals of Deeds not found to be real, which is a way of confounding all Verdicts.

When the Jury say, The Manor of Hook Norton with Demised a fine prioris dimissione in Indenture factis modicis for Ninety years, they do not say, a fine prioris dimissione ejusdem Manerij.

So as if nothing else were, the former Indenture mentioned might be of the Vicarage, or any other thing, and not at all of the Manor; and yet by the Indenture of Mar. the Demise of the Manor was its continuance from these spirituals to such temporal Demise, whatever was Demised by it.

But the Indenture of Mar. Demised all the premises contained in the first Indenture, Habendum from the expiration of the term.

Ergo, If the Manor be not comprised in the first Indenture, it cannot be defined by Mar. from the expiration of the first term in the first Indenture.

But admitting this, Who can say the Manor of Hook Norton is not comprised in the first Indenture? For first, What if only part of the first Indenture is recited, and not all, in the Deed of Mar. and so the Manor omitted in the recital, tho' it were comprised in the Indenture of 29 H. 8. and perhaps the Jury might, if that Indenture were produced to them, see it was comprised in the Indenture, tho' not recited to be so?

2. What if the Indenture of 29 H. 8. were misdated in Mar. and instead of the Manor the word Mansion recited?

3. It is apparent, that the Indenture of 29 H. 8. was not recited, nor pretended to be recited verbatim in that of Mar. because after so much of the Indenture of 29 H. 8. is recited in that of Mar. it is said, as by the said Indenture, viz. 29 H. 8. among divers other Covenanted Grants, more plainly appeareth.

So as there were other Grants in the said Indenture of 29 H. 8. than are recited in Mar. and the Grant of the Manor by name might be one of them.

Hill. re Car. 1.
B. R. Wilkin-
son & Meri-
am's Case,
Rolls 700 &
701. tit.
Tryal.

If a Jury find that J. S. was seized in fee of Land, and pos-
sessed of certain Leases for years of other Land, made his Will
in writing, and thereby devised his Leases to J. D. and after-
wards devised to his Executors the residue of his Estate, Mortgages,
Goods, &c. his Debts being paid, and Funeral Expences discharg'd.
It being referred by the Jury to the Court, Whether by this
Devises the Executor hath an Estate in fee or not? This is no
perfect Special Verdict, because the Jury find not the Debts
paid, and the Funeral Expences discharged, which is a Condi-
tion precedent to the Executors having an Estate in fee, and
without finding which the Court cannot resolve the matter to
them referred by the Jury: Therefore a *Venire facias de novo*
was awarded.

Judgment was given for the Defendant.

Trin:

17 Car. 2. And the said Defendant, after the death of the Intestate, viz. the 10th day of March, 18 Car. 2. and often after, at the said Parish and Ward, by the Testator Pierce were required. And the said Defendant, after the death of the Testator, the first day of January, 21 Car. 2. was required, at the place aforesaid, by the Plaintiff to pay the said Money, which he did not, and still refuses, to his damage of 800 l.

The Defendant pleads payment, after the Plaintiff's Writ purchased, of several great Debts due by Bond and Bills obligatory from the Intestate, to several persons at his death, in number one and thirty.

That the Intestate, the 22d of December, 16 Car. 2. became bound in a Recognizance in the Chancery to Sir Harbottle Grimstone Baronet, Master of the Rolls, and to Sir Nathaniel Hobart, one of the Masters of the Chancery, in 2000 l.

And that the said 2000 l is still due and unpaid, and the said Recognizance in its full force, unsatisfied or discharged.

He pleads, The City of London is an ancient City, and that within it, time out of mind, hath been held a Court of Record of the King's, &c. before the Mayor and Aldermen of the said City, in Camera Gildball ejusdem Civitatis, of all personal Actions arising and growing within the said City.

That the Intestate at the time of his death, was indebted apud London pdict', in the Parish and Ward pdict', to one William Allington in 260 l. 17 s. 7 d. and who after the purchase of the Plaintiff's Writ, the 10th of March, the 18th of the King, came to the said Court, before Sir Thomas Bludworth then Mayor, and the Aldermen in the said Chamber, according to the Custom of the said City, held, used, and approved.

Et pdict' *Willielmus Allington* tunc & ibidem in eadem Curia, secundum consuetudinem pdict' Civitatis, affirmabat contra pdict' *Rolandum Dee*, ut Administratorem, &c. quandam Billam Originalem de placito debiti super demand' Mille sexcentarum & septuaginta librarum, & decem & septem solidorum, & septem denariorum, legalis monetar, &c.

And that it was so proceeded, according to the Custom of the said City, that the said William Allington had Judgment to recover against the Defendant the said Debt, and 85 l. 16 s. for Damages, &c.

2. That the Defendant's special Plea in Bar appearing in any part of it to be false and insufficient, the Plaintiff ought to have Judgment for his whole Debt.

1. For the first Cause, it was urged as an Exception to the Defendant's Plea, That by the Plea it appears, that time out of mind a Court hath been held in the City of London, before the Mayor and Aldermen, of all personal Actions arising and growing within the said City.

And that the Intestate was at the time of his death indebted to the said Allington at London, within the Parish and Ward of St. Mary Bow and Cheapside.

But it is not alledged, That the said Debt did arise and grow due in London, within the said Parish and Ward; for where-soever the Debt did arise and grow due, yet the Debtor is indebted to the Creditor in any place where he is, as long as the Debt is unpaid.

And therefore to say, The Intestate was indebted to Allington in the said Sum apud London, &c. affirms not that the Debt did arise and grow due at London; and if not, the Court had no Jurisdiction of the Cause.

The effect of the Defendant's Bar is only to shew, That such a Judgment was obtain'd in such a Court against him, and not to set forth the whole Record of obtaining it; for it were vast expence of Time and Money so to do, as often as occasion is to mention a Record; and refers to the Record put per Record plenius liquet, where the Plaintiff may take advantage of any defect therein. But if that were necessary, it is well set forth; for his Plea is,

Et pdictus Willielmus Allington tunc & ibidem in eadem Curia, secund' consuetud' Civitat' pdict' affirmabat contra pdict' Roland' Dee ut Administratorem, &c.. quandam Billam Originalem de placi-
cito debiti, &c.

And the Custom being to hold Plea of personal Actions arising within the City, if he affirmed a Bill of Debt, according to the Custom,

It must be of a Debt arising and growing due within the City.

2. A second Exception was, That it is not set forth for what the Debt was, whereby the Court may judge whether it were payable or not by the Administrator.

It will be still objected, That if the Law be, that Executors or Administrators may pay Debts upon simple Contracts of the deceased, to which they are not bound, and thereby prevent the payment of a Debt to which they are bound: it is repugnant to Reason, and consequently cannot be Law; for that is in effect at the same time to be bound, and not bound to pay: for he who may not pay being bound, is not bound at all. For clearing this, we must know,

Cho' Executors or Administrators are not compelled by the Common-Law to answer Actions of Debt for simple Contracts, yet the Law of the Land obligeth payment of them. For,

1. Upon committing Administration, Dath is taken to administer the Estate of the dead duly, which cannot be without paying his Debts.

2. Dath is taken to make true Account of the Administration to the Ordinary, and of what remains, after all Debts, Funeral Charges, and just Expences of every sort deducted.

3. This appears also by the Statute of 31 E. 3. c. 11. That Administrators are to administer and dispend for the Soul of the dead, and to answer to others to whom the dead persons were holden and bound; which they cannot better do, than by paying their Debts.

Plowd. Com. 185. a. b. And as this was the ancient Law and Practice before in the Spiritual Court, so by the new Act in 22 & 23 of the King, for the better settling of Intestates Estates, it is enacted accordingly, That upon the Administrators Account deductions be made of all sorts of Debts.

This appears to be the ancient Law, by the Great Charter, c. 18. and long before by Glanvill in H. 2.'s time, and Bracton in H. 3.'s time.

4. And by Fitzherbert in the Writ de rationabili parte bonorum, the Debts are to be deducted before division to the Wife and Children. And upon the Executors Account all the Testators Debts are to be allowed before payment of Legacies; which were unjust, if the payment of them were not due, as appears by Doctor and Student.

Executors be bound to pay Debts before Legacies by the Law of Reason, and by the Law of God; for Reason wills that they should do first that is best for the Testator, that is, to pay Debts which he was bound to pay, before Legacies which he was not bound to give.

of him, Si l'avoyned son Suite; not his own, but his who counted against him; que dit, que voyl; and after Littleton said to the Attorney of the Plaintiff, The Court awards, that you take nothing by the Writ; for know, that a man shall never have an Action against Executors, where the Testator might have waged his Law in his life-time. *Quod nota.*

It was not proper to ask the Plaintiff's Attorney, whether he would avoid his Client's Suit: and an unlikely Answer of his to say, Yes: but a rational demand to the Defendant's Attorney, whether he would avoid his Suit who counted against him; and probably he should answer, Yes. And after Littleton said to the Attorney of the Plaintiff, The Court awards you take nothing by your Writ. If he had been the person to whom the question was first asked, and who immediately before had answered, Yes, the Book had not been that after Littleton said to the Attorney of the Plaintiff, but that Littleton said to him who was the same he discoursed with.

The Print thus rectified, this Case agrees with the Law delivered by Cotsmore. An Executor is sued, and declared against in Court (for so was the course then) upon a simple Contract of his Testator's; The Judge asks his Attorney, Whether he had a mind to avoid the Suit? who answered, Yes. If the Judge had thought fit, he might have avoided the Suit without making any Question: but knowing it was not consonant to Law to avoid a Suit upon a simple Contract, unless the Executor himself desired it, he therefore asked him the Question; and finding he did desire it, the Judge presently told the Plaintiff's Attorney, he could take nothing by the Writ. Else you see the consequence of this Judgment, That the Judges, ex Officio, should prevent any Judgment for the Plaintiff in Debt, brought upon a simple Contract against an Executor, whether the Executor would or not, against former and subsequent usage.

Brook in abridging this Case, and not reflecting upon it rightly, abridges it, That Littleton demanded the Plaintiff's Attorney, If he would abow his Suit; whereas the word is clearly avoid, and not avow: And to what purpose should he ask that Question: for sure it was avowed as much as could be, when counted upon at that instant in Court.

25 E. 3. f. 40. The first is, 25 E. 3. f. 40. where an Action was brought against an Executor upon a Tally struck by the Testator. The Judges said, *Nil capiat per Breve, if he have no better Specialty.*

12 H. 4. f. 13. The like Case is, 12 H. 4. f. 13. where a like Action was brought against the Executor or Administrator upon a Tally of the Testators; and there it appears the Defendant's Council would have demurred, and the cause is mentioned, That the writing of the Tally might be washed out by water, and a new put in the place, and the Notches changed; and the Judgment was, *Nil capiat per Breve.*

This being the same Case with the former, the reason of the Judgment was the same as grounding an Action upon a Specialty not good in Law.

Besides it appears in the latter Case, the Executor opposed the Action by offering to demur; and for any thing appearing, he did so in the first.

f. 13. The other Case is, 41 E. 3. f. 13. where an Action upon the Testator's simple Contract was brought against an Executor, and the Executor or a Co-Executor to him: The Writ was abated for that reason, and said withal, There was no Specialty shewed; but the first reason abating the Writ necessarily, it no ways appears the Judges would, ex Officio, have abated the Action for the last cause, if the Executor desired it not.

So as when the Executor or Administrator hath once pleaded to an Action of Debt upon a single Contract, he is equally bound up for the event, as in any Action wherein the Testator or Intestate could not have waged his Law.

It is therefore an ill consequence for the Plaintiff to say, I have brought an Action upon a simple Contract, wherein the Intestate could not have waged his Law; therefore I must be paid before another Creditor by simple Contract, bringing an Action wherein the Intestate might wage his Law: For it is in the Administrator's power, by omitting to abate the Writ at first, to make the Debt demanded by Action in which the Intestate might have waged his Law, to be as necessarily and coercively paid, as the other Debt demanded by Action, wherein he could not wage his Law.

And if the Executor believes the Debt by simple Contract demanded by Action of Debt to be a just Debt, it is against honesty, conscience, and the Duty of his Office, to demur, whereby to delay, or prevent the payment of it.

Besides,

25 E. 3. f. 40. The first is, 25 E. 3. f. 40. where an Action was brought against an Executor upon a Tally struck by the Testator. The Judges said, Nil capiat per Breve, if he have no better specialty.

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Besides,

Turner's
Case, 8 Rep.

But to plead, that he hath not bona & catalla ppterquam bona quæ non attingunt, to satisfie the said Judgments and Statutes, is not good, for the uncertainty; for if the Judgments and Statutes amount to 500 l. 20 l. are bona quæ non attingunt, to satisfie them; so is 40 l. so is 100 l. so is 200 l. and every sum less than will satisfie: So as by such Plea there is no certain Issue for the Jury to enquire, nor no certain Sum confessed towards the payment of any Debt, as is well resolv'd in Turner's Case.

Janu. 33,

1.

So if a man pleads he hath not Assets ultra what will satisfie those Judgments, the Plea is bad for the same reason; for so l. is not Assets ultra that will satisfie them, nor 40. nor 100. nor 200. nor doth that manner of pleading confess he hath Assets enough to satisfie: As to say, I have not in my Pocket above 40 l. is not to say, I have in my pocket 40 l.

But in this Case, the Defendant hath pleaded payment of several Bonds, Bills and Judgments, and pleads one Recognizance of 2000 l. and one Judgment of 7000 l. wholly unsatisfie, and concludes his Plea with plene administravit.

And that he had not, *die impetracionis brevis, nec unquam posset, aliqua bona seu catalla* of the Intestate's, *in manibus suis administranda ppterquam bona & catalla, ad valenciam separalium denariorum summarum per ipsum, sic ut presertur solutarum, in discharge of the said several Judgments, Bonds and Bills.*

Et ppterquam alia bona & catalla ad valenciam decem solidorum quæ executioni recognitionis pdict', & judicij pdict', per ffac' Car. Cornwallis recuperat' onerabilia existunt.

Now upon this Plea, if Allington's Judgment of 2670 l. or the Statute of 2000 l. or both, be avoided, yet the Plaintiff hath no right to be paid until the Judgment of 7000 l. be so satisfied, and that some Assets remain after the satisfaction of it in the Administrator's hands; for before the Plaintiff hath no wrong, nor the Administrator doth none, nor hath any benefit by not satisfying the Plaintiff.

That spungy Reason, that the Defendant's Plea is all untrue, and therefore if any part be false, as either in that of Allington's Judgment or the Recognizance, the Plea is bad, is not sense; for if the falsehood be neither hurtful to the Plaintiff, nor beneficial to the Defendant, why should the Plaintiff have what he ought not, or the Defendant pay what he ought not?

Suppose the Defendant pleaded a Judgment obtain'd against the Intestate or himself, and that the Intestate or himself were married at the time of the Judgment obtain'd, (which in truth was

Hill. 18 & 19 Car. 2. C. B.

Thomas Price is Plaintiff, against Richard Braham, Elizabeth White, Elianor Wakeman, and Richard Hill, Defendants, In an Action of Trespass and Ejectment.

The Plaintiff declares, That one Henry Alderidge, the first of November, 18 Car. 2. at the Parish of St. Margarets Westminster, demised to the Plaintiff and his Assigns an acre of Land, with the appurtenances, in the Parish of St. Margarets aforesaid.

Habendum from the 30th of October then last past, for the term of five years next ensuing; by virtue whereof he entered, and was possessed, until the Defendants afterwards, the same day, entered upon him, and did eject him, to his damage of 20l.

To this the Defendants pleaded, That they are not Culpable.

Special Verdict is found; by which it is found, That the Defendants are not culpable of Entry and Ejectment in the said Acre, excepting a piece thereof, containing One hundred and eighty Foot thereof in length, and Eight and twenty Foot in breadth.

And as to that piece, they find, That the same time out of mind was a Pool, until within Twenty years last past, during which Twenty years it became filled with Mud.

They find, That before the Trespass supposed, that is, the first of August, 1606. King James was seized, in Right of the Crown, of the said Pool, and three Gardens, with the Appurtenances, in St. Margarets aforesaid, in his Demesne as of Fee.

They find again, That the same first day of August, 1606. a Water-work was built in the said Gardens, and the said Pool was thence used with the said Water-work, until the 12th day of March, in the 11th year of King James.

That

the aforesaid piece of Land, containing as aforesaid in length and breadth, by the name of all that piece of Land, or broad Ditch, lying and being in the Parish of St. Margarets Westminster, with particular Boundaries thereto expressed,

To have and to hold from the Feast of the Annunciation last past, for the term of One and twenty years thence next ensuing.

They find, That the said Henry Alderidge entered into the premises, then in the possession of the Defendants, and so possessed, made the Lease to the Plaintiff, Habendum to him and his Assigns, as in the Declaration.

That the Plaintiff entered by virtue thereof into the said piece of Land, and was possessed, till the Defendants ejected him.

And if, upon the whole matter, the Defendants be culpable, they assets Damages to 12 d. and Costs to 40 s. And if they be not, they find them not culpable.

The first Question is, What can pass by the name of Stagnum or Gorges? for if only the Water, and not the Soyl, passeth thereby, the Question is determined; for the piece of Land containing such length and breadth, cannot then pass.

Fitz. N. Br. By the name of Gorges, Water and Soyl may be demanded
191. b. Let. H. in a Precipe.

34 Aff. pl. 11. By the name of Stagnum, the Soyl and Water is inten-
Co. Lit. f. 5, 6. ded.

ad finem.
Plowd. 157. b. 1. Where a man had granted to an Abbot, totam partem
158. piscariae suæ, from such a limit to such a limit, reservatio mihi
Stagno molendini mei, and the Abbot for a long time after
the Grant had enjoyed the Fishing of the Pool: It was ad-
judged the Reservation extended to the Water and Soyl, but
the Abbot had the Fishing by reason of long Usage after the
Grant, which shewed the intent.

1606. 4. Jac. The next Question is, When the Soyl may pass by the
6 Co. 64, 65. word Stagnum, whether it may, as belonging and pertaining
66. to the Water-work erected 6 Jac. and granted away with the
Cro. Car. 308. Pool, as pertaining to it in 11 Jac. as it is found: or to
the Gardens, which seems a short time, especially in the Case
of the King, to gain a Reputation, as belonging and appur-
taining?

Quod Stagnum fidic' fuit necessarium p structura (Anglice Water-work) fidic' quodque eadem structura sine eodem Stagnno operare non potuit.

And where a thing is so pertaining to the nature of the thing granted, it is belonging and pertaining immediately as soon as the thing is created, and it is annexed to it.

And note, the Jury do not find that aqua Stagni fidic', but the Stagnum it self, was necessary for the Water-work. They do they find that the Water-work could not operare sine aqua Stagni, but sine Stagnu fidic'. And therby they find that the Water and Soyl, which Stagnum signifies, was necessary for the work, and it could not work without it.

Pafch.

6. That the said Plaintiff at first resisted, and refused to obey the said Warrant, and after obey'd it. That the said Samuel the Constable required the said Defendant Thomas Merrett to assist him to convey him before a Justice of the Peace: But the said Samuel, Thomas Merrett, and John Cromwell, conveyed him to the house of the said Samuel in Dumbleton.

7. Et tunc the aforesaid Richard Coxe Miles sent for the said Samuel, at the house of the said Samuel in Dumbleton aforesaid, Et pcepit eidem Samueli, to lay the Plaintiff in the Stocks; and thereupon the said Samuel, John and Thomas conveyed the Plaintiff fromwards the way to the said Rich. Baughes, Justice of the Peace, and about Eleven of the Clock of the same day in the morning, put the Plaintiff in the Stocks.

8. They find the Act of 21 Jac. particularly cap. 12. and the recital therein of the Act of 7 Jac. cap. 5. being an Act entitled, An Act for easie Pleading against troublesome and contentious Suits against Justices of the Peace, Mayors, Constables, &c.

9. And find particularly, That it was enacted by the said Parliament, Quod si aliqua Actio, Billa, &c.

10. But whether upon the whole matter by them found, the said Sir Richard Coxe Baronet, John and Thomas are Culpable, they know not. Et petunt advisamentum Curie in pmissis.

11. And if upon the whole matter so found, the Court shall think, quod Actio pdicta possit commensari in London: then they find the said Richard Coxe Baronet, John and Thomas Culpable of the Trespass, and assess Damages to One hundred Marks, and Costs to Thrice and fifty shillings and four pence.

12. But if the said Court be of Opinon, That the aforesaid Action could only be laid in the County of Gloucester, then they find the said Richard Coxe Baronet, John and Thomas not Culpable.

The words of the Act of 21 Jac. cap. 12. and which are particularly found by the Jury, are,

1. That if any Action, Bill, Plaintiff, or Suit upon the Case, Trespass, Beating, or False Imprisonment, shall be brought against any Justice of the Peace, Mayor or Bailiff of City or Town-Corporate, Headborough, Portreeve, Constable, Tythingman, &c. or any of them, or any other, which in their Aid or Assistance,

Plaintiff please to lay it there; and if he so pleased, it might have been laid there before the Act of 21. which was purposely made to compel the laying of the Action where the Fact was done.

2. By such Exposition of the Act, the Action shall never be laid where the Fact was done; for if it may be laid elsewhere at all, if it be found upon the Tryal that the Officers questioned did not according to their Office, there will be no cause to lay the Action in the proper County; for the Jury where the Action is laid will find for the Plaintiff for the Misfeasance; and if it be found the Defendants have pursued their Office, wherever the Action is laid, the Jury will find for the Defendants, and then no cause to lay an Action in the County where the Fact was done: So Quacunque via data, the Act will be void.

3. If it can be laid in another County, without hearing Evidence, it cannot be known whether the Officer hath misdone or not: how then can the Jury (as the Act directs) find the Defendants Not guilty, without regard or respect to the Plaintiffs Evidence: For then the Jury must regard the Evidence, to find whether the Officer hath misdone, and not regard the Evidence at all, to find the Officers Not guilty, as the Act doth order.

Now is there any inconvenience, because by the intention of Law, whether the Officers have done justifiably or not, without this Act of 21. the Action ought to be laid where the Fact was done; and the Act is but to compel the doing of that where an Officer is concerned, that otherwise fieridebuit, the factum valer not being done.

The second Question is, Whether upon the special points referred to the Court by the Jury, they have found all the Defendants, or any of them, and whom, Not guilty?

It hath been admitted at the Bar, That the Defendants, excepting Sir Richard Coxe, cannot be found culpable by this Act of 21. and it being a Teaspas, that some may be guilty, and not others; which is true.

But the Question is not, Whether some of the Defendants might have been found guilty, and others not: but whether, as this Verdict is, all or none must be Culpable?

1. The Jury refer to the Court, Si actio pdicta poruit commensari in London, then they find all the Defendants culpable. And if actio pdicta poruit commensari tantummodo in the County of Gloucester, then they find all the Defendants by name Not guilty.

So

Et super hoc idem *Bogo* petit *Judic'*, si de pcepto, missione vel assensu, si sibi imponeretur ad sectam Dñi Regis respondere debeat, antequam factores principales, aliquo modo de facto illo convincantur. *Whereupon Judgment was given.* Et quia per consuetudinem & legem *Angliae*, nullus de pcepto vi & auxilio aut missione respondere debeat antequam factores aliquo modo convincantur, consideratum est quod pdict' *Bogo* ad pfectus ear inde sine die, & pdict' *Jo. le Wallis* sequatur versus factores principales put sibi viderit expediri si voluerit, & six persons manuceperunt pdict' *Bogonem* ad habendum ipsum coram Dño Rege ad respondendum ipsi Dño Regi ad voluntatem suam, cum pdicti factores de facto illo fuerint convicti, si Dominus Rex versus eum inde loqui voluerit.

A Judgment in Parliament at the King's Suit, That it was against the Custom and Law of the Kingdom, to convict a man de pcepto, auxilio, aut missione, in a Trespass, before some who did the principal Trespass were convicted.

And the reason of that Law is very pressing, for else a man may be found culpable of aiding or precepting a Trespass to be done, when the Doers of the Trespass are acquitted, and not culpable; which is to be culpable of aiding the doing of a thing never done, which is impossible.

It will be said, The Law in that Case is since altered, and otherwise practised. But who could alter a Law, affirmed by Judgment in Parliament to be the Custom and Law of the Kingdom, without an Act of Parliament to alter it, which was not; or at least an Error in another Parliament, if that might be, which is not so clear?

For this is not like a Judgment given in one Court, and after contraried in another, or in the Chequer Chamber: Any Law of the Kingdom might as well be altered without Act of Parliament, as this.

5. However, letting that pass, but as the Law is now taken, no man can be guilty of aid or assistance to a Trespass not done, and which is the same whereof the Actors are acquitted.

But in this Case, they that put the Plaintiff in the Stocks are found Not Guilty, and another Defendant found Guilty for bidding him be put in the Stocks.

6. Another Reason is, That Coxe cannot be culpable of a Trespass which cannot or must not be proved, (which is the same) But by the Statute no regard or respect is to be had of the Evidence probing the Trespass, if the Fact be not proved to be done where the Action is laid: Therefore there can be no Evidence

Pascb. 21 Car. 2. In Banc.

William Hayes Plaintiff, and Charles Bickerstaff Defendant;
In Arrest of Judgment.

Charles Bickerstaff being possessed of a long term of years in certain Woodlands and Coppices in Cobham in the County of Kent, demised, lett, and to farm lett the same for six years, part of his term, to the Plaintiff, under a Rent, and other Reservations, and covenanted; The Plaintiff keeping and performing the Agreements of his part to be kept and performed,

Quod predictus *Willielmus Hayes* legitime haberet, teneret, & gauderet, & habere, tenere, & gaudere potuisset, predicta dimissa pmissa juxta conventionem pantea, in & per Indenturam predicti dismiss. absque aliquo impedimento, perturbatione, evictione, vel interruptione quacunque, de vel per dictum *Carolum Bickerstaff*, Executores, Administratores, vel Assignatos suos, aut aliquem eorum put per Indenturam predicti plenius apparent.

That by virtue of the said Demise he entred, and was possessed; and that after, the Defendant being possessed for a longer term, granted the Reversion to Charles Duke of Lenox, to whom the Plaintiff attorned; and that afterwards the said Duke, and others by his command, entred upon the Plaintiff, (although he observed all Agreements of his part) and carried away many Loads of Faggots and Wood, and kept, and still keeps him out of possession, to his Damage of Eight hundred Pounds.

And brings his Action for breach of the Covenant aforesaid.

The Defendant pleads Enjoyment according to the Demise, and traverseth the Grant of the Reversion to the Duke, modo & forma.

All Covenants between a Lessor and his Lessee, are either Covenants in Law, or Express Covenants.

By Covenant in Law, the Lessee is to enjoy his Lease against the lawful Entry, Eviction, or Interruption of any man, but not against tortious Entries, Evictions, or Interruptions, and

Dyer 15, 16
Eliz. 328. 2.
p. 8.

It is the Case of Mountford and Catesby in the Lord Dyer: Catesby, in consideration of a Sum of Money and a Horse, made a Lease to Mountford for a term of years, Et super se assumpsit, quod the Plaintiff Mountford pacifice & quiete haberet & gauderet the Land demised, durante termino, sine evictione & interruptione alicujus personæ. After Catesby's Father entered upon him, and so interrupted him; whereupon Mountford brought his Action upon this Assumpsit, and Catesby pleaded he did not assume, and found against him. It was moved in Arrest of Judgment for the Defendant, That the Entry might be wrongful, for which the Plaintiff had his Remedy; but disallowed, and Judgment affirmed for the Plaintiff: Because (saith the Book) it is an express presumption and assumption that the Plaintiff should not be interrupted. And this Case is not expressly denied to be Law in Essex and Tisdale's Case in the Lord Hobart, as being an express Assumption.

Tho' the L. Dyer's Case be an Action of the Case upon an Assumpsit, and our Case an Action of Covenant; yet in the nature of the Obligation there seems no difference, but in the form of the Action: For to assume that a man shall enjoy his term quietly, without interruption, and to covenant he shall so enjoy it, seems the same undertaking.

Post 121. But if the Reason of Law differ in an Assumpsit from what it is in a Covenant, as seems implied in Tisdale's Case, then this Case of the Lord Dyer makes nothing against the Case in question, which is upon a Covenant, not an Assumpsit.

Hob. f. 34, 35. 1. Elias Tisdale brought an Action of Covenant against Sir William Essex, and declared, That Sir William convenit, promisit, & agreavit, ad & cum fidic' Elia, quod ipse idem Elias haberet, occuparet & gauderet certain Lands for seven years, into which he entered; and that one Elsing had ejected him, and kept him out ever since. Resolved, Because no Title is laid in Elsing, he shall be taken to enter wrongfully, and the Lessee hath his Remedy against him. Therefore adjudged for the Defendant Essex.

Here is a Covenant for enjoying during the term, the same with enjoying without interruption, (for if the enjoyment be interrupted, he doth not enjoy during the term) the same with enjoying without any interruption, the same with enjoying without interruption of any person; which is the Lord Dyer's Case: but here adjudged the interruption must be legal, or an Action of Covenant will not lie, because there is Remedy against the Interrupter. So is there in the Lord Dyer's Case.

And

one Gay entred upon him, and outed him: It was adjudged the Replication was naught, because he did not shew that he was evicted out of the Land by lawful Title, for else he had his Remedy against the Wrong-doer.

This was in an Action of Debt upon a Bond, conditioned for quiet Enjoyment: So as neither upon Covenant, upon Assumpsit, or Bond conditioned for quiet enjoying, unless the Breach be assigned for a lawful Entry or Eviction, (and upon the same Reason of Law, because the Lessee may have his Remedy against the Wrong-doers) an Action of Covenant cannot be maintained.

Cok. 4 Rep.
Nokes's Case. 4th Rep. To these may be added a Resolution in Nokes's Case in the 4th Rep. where a man was bound by Covenant in Law, That his Lessee should enjoy his term, and gave Bond for performance of Covenants: In an Action of Debt brought upon the Bond, the Breach was assigned, in that a stranger had recovered the Land leased in an Ejectione firmæ, and had Execution; tho' this Eviction were by course of Law, yet for that an elder and sufficient Title was not alledged upon which the Recovery was had, it was no breach of the Covenant.

Inconveniences if the Law should be otherwise.

1. A Man's Covenant, without necessary words to make it such, is strain'd to be unreasonable, and therefore improbable to be so intended; for it is unreasonable a man should covenant against the tortious acts of strangers, impossible for him to prevent, or probably to attempt preventing.

2. The Covenantor, who is innocent, shall be charged when the Lessee hath his natural Remedy against the Wrong-doer: and the Covenantor made to defend a man from that from which the Law defends every man, that is, from Wrong.

3. A man shall have double Remedy for the same Injury against the Covenantor, and also against the Wrong-doer.

4. A way is opened to damage a third person (that is, the Covenantor) by undiscoverable malice between the Lessee and a stranger; for there is no difficulty for the Lessee secretly to procure a stranger to make a tortious Entry, that he may therefore charge the Covenantor with an Action.

Post 123.

Ibid.

6. Lastly, By the very words of this Covenant, the Lessor cannot be charged with breach of Covenant for the tortious Entry or interruption of his Assignee. The words are, That the Lessee should lawfully, *legitime haberet, teneret, & gauderet, & tenere, & gaudere potuisset*, the premisses, without the lett, interruption, &c. of the Defendant, his Executors, Administrators and Assigns.

If the Lessor were to be charged with the tortious Acts of his Assigns, there needed no more (if those words would do it) than to say, That the Lessee should have, hold and enjoy the Lands demised, without interruption of the Lessor, his Executors, Administrators; and the word *lawfully* was useless and sensless in the Covenant also.

But when it is said, That he should and might lawfully have, hold, and enjoy it against the Lessor, his Executors, Administrators and Assigns, what other meaning can be given the words, than that he might, according to Law, enjoy it; and that the Lessor, his Executors, Administrators or Assigns, should not have power lawfully to hinder him?

For a man then is said to enjoy a thing lawfully, when no man lawfully can hinder his enjoying it.

So as by all the Authorities cited, by all the Reasons of Law anciently and modernly, and by the particular words of the Covenant in question, the Defendant cannot be charged with breach of his Covenant for the tortious Entry of his Assignee upon the Plaintiff.

A Replevin brought, and the Beasts returned Elongata, whereupon there was a Capias in Withernam, and Nine Oxen taken. The Plaintiff in the Replevin gave the Sheriff's Bailiff a Bond of Ten Pounds to save him harmless for those Oxen. The Defendant in the Replevin, whose Beasts they were, brought a Detinue against the Bailiff, and thereupon he sued his Bond for his Damage in being distained in the Detinue. This appearing to the Court, and Judgment demanded in the Action of Debt, Brintley said, *Que dites vous que il doit defender encounter-tous le mond ? Non ferra, ne encounter nul Action, au quel vous poies aver droiture defence sans luy per la Ley, per que avisez vous.* And so was the general Opinion, but it was not adjudged.

Objections.

It was smartly objected by my Brother Broome, If the Lessor shall not be charged upon his Covenant for the tortious Entry of his Assignee by this express Covenant, then is the Covenant useless; for by a Covenant in Law upon the Lease it self, he was to be charged for a legal Entry made by his Assignee, if this Covenant had not been at all.

I answer, It is not necessary the Lessor and Lessee should understand what are Covenants in Law, and therefore they might impertinently make an express Covenant which they understood, which was already supplied by an implied Covenant, which they understood not.

As where a Feoffment is made by Dedi & concessi, which is a Warranty in Law, it is not rare to have an express Warranty of the same extent with the Warranty in Law.

But there is a more close and solid reason why they are named in the Covenant; for if they had not been expressed, the Demise it self had been a Covenant in Law against the legal Interruptions both of them, and all men else. But by expressing a Covenant against them, the general Covenant against all men is thereby restrained, and not enlarged against them; for now the Lessor hath covenanted for enjoyment against the legal Evictions of himself, his Executors, Administrators and Assigns, and of no other.

This was clearly resolved in Nokes's Case, where a man by his Deed granted and demised certain Lands for years, which Demise imported in it self a Covenant in Law, and he further expressly covenanted for Enjoyment, against himself and all others, claiming from or under him, which express Covenant was narrower than his Covenant in Law, and gave Bond for performance of Covenants. Two points were resolved:

1. That this Bond extended to the Covenant in Law.
2. That by the express Covenant, the Covenant in Law was restrained, by Popham's Opinion, and all the Court.
3. It was agreed that the same had been resolved before, about 14 El. in the Case of one Hammond; And Sir Ed. Coke in the close of the Case saith, Much inconvenience would else happen against the intention of parties; the express Covenants in Deeds being different from the Covenants in Law usually.

Mapes made a Lease of the Parsonage of Brankister to Wilson and Foster for a year, and covenanted to save them harmless for that years Profits, against one Blunt, then Parson of Brankister, who entred upon them, and took the Tithes.

In an Action of Covenant brought against Mapes by Wilson and Foster, tho' they did not set forth any good Title in Mr. Blunt for that years Profits, it was judged for the Plaintiffs, Because, saith the Lord Hobart, the Covenant was to save them harmless for that years Profits, against such a man particularly.

Which importeth they should not be dammified in that years Profits by Blunt, which was more than to warrant the Title; for Blunt might go beyond the Seas, dye insolvent, and so prevent them of their Remedy for the Profits.

So in Crook it is said, That the Covenant being against a particular man, it extends to his tortious Entries, *arguendo*; but there it appearing that Blunt was Parson of the Rectory, the Court was of Opinion that his Entry was legal and good, and therefore the Covenanter in that Case was charged for a legal Entry, and not a wrongful. So is the Book expels in the end of the Case.

If a man upon sale of Land refuses to give a general Warranty against all men, but narrows his Warranty, and gives only against him and his heirs, this alters not the nature of the Warranty (as to make him any way answer for tortious Entries, or to subject him to any thing more than his Warranty against all men subjected him;) So in a Covenant upon a Lease for Enjoyment against him and his Assigns, (which is in the nature of a Warranty for a Chattel) he shall not otherwise be charged by his Covenant, than if he had covenanted, that is, warranted, against all men.

of Religion, according to the Act of the 13th of the Queen and was lawful Incumbent of the said Rectory of Elme, but after did not read the Articles of Religion within two months after his Induction in the Church of Elme, according to the Act of 13 Eliz.

Primo Maij, 1669. Hugh Ivy, Lessor of the Plaintiff, was lawfully presented, admitted, instituted and induced into the Rectory of Wringlington, as supposed void, and performed all things requisite for a lawful Incumbent of the said Rectory to perform, both by subscribing and reading the Articles of Religion, according to the Statute of 13 Eliz.

And that he entred into the said Rectory and Premisses, and made the Lease to the Plaintiff, as in the Declaration.

That the said Higden the Defendant did enter upon the Plaintiff the said 10th of May, 1669. as by Declaration.

The Questions spoken to at the Bar in this Case have been two :

1. Whether the Rectory of Wringlington, being a Benefice with Cure, and of clear yearly value of 50 l. and but of 5 l. in the King's Books, shall be estimated according to 50 l. per ann, to make an Avoidance within the Statute of 21 H. 8. by the Incumbent's accepting another Benefice with Cure ?

But that is no Question within this Case; for he it of value or under value, the Case will be the same.

2. Whether not reading the Articles according to the Statute of 13 Eliz. within two months after Induction into the Church of Elme, shall exclude Higden not only from the Rectory of Elme, but from the Rectory of Wringlington? which is no point of this Case; for whether he read or not read the Articles in the Church of Elme, he is excluded from any Right to the Church of Wringlington.

For this Case depends not at all upon any Interpretation of the Statute of 21 H. 8. of Pluralities: but the Case is singly this :

Higden being actual and lawful Incumbent of Wringlington, a Benefice with Cure, be it under the value of 8 l. yearly, or of the value, or more, accepts another Benefice with Cure, (the Rectory of Elme) and is admitted, instituted and induced lawfully to it, be it of the value of 8 l. or more, or under.

The

For clearing this, certain **Clauses** of the **Act** of 13 Eliz.
are to be opened.

The first is,

Every person, after the end of this Session of Parliament, to be admitted to a Benefice with Cure, except that within two months after his Induction he publickly read the said Articles in the same Church whereof he shall have Cure, in the time of Common-Prayer there, with Declaration of his unfeigned assent thereto, &c. shall be upon every such default, *ipso facto*, immediately deprived.

There following relative to this Clause,

Provided always, That no Title to confer or present by Lapse, shall accrue upon any Deprivation *ipso facto*, but after six months after notice of such Deprivation given by the Ordinary to the Patron.

By these **Clauses**, immediately upon not reading the **Articles** according to the **Statute**, the **Incumbent** is deprived *ipso facto*.

And the Patron may presently upon such Deprivation present if he will, and his Clerk ought to be admitted and instituted; but if he do not, no lapse incurs until after six months after notice of the Deprivation given to the Patron by the Ordinary, who is to supply the Cure until the Patron present.

Another **Clause** of the **Statute** is, No person shall hereafter be admitted to any Benefice with Cure, except he then be of the Age of Three and twenty years at the least, and a Deacon, and shall first have subscribed the said **Articles** in the presence of the Ordinary, &c.

And relative to this **Clause** there is a third, That all Admissions to Benefices, Institutions and Inductions of any person, contrary to any Provision of this **Act**, shall be utterly void in Law, as if they never were.

Now tho' the Church of Wringlington became void immediately, of what value soever it were, by Admission and Institution of the Defendant into the Church of Elme, by the ancient Canon-Law received in this Kingdom, which is the Law of the Kingdom in such Cases, if the Patron pleased to present,

And soz that the Patron accordingly did within a month after the Defendant's Admission and Institution into the Rectory of Elme, present his Clerk, Hugh Ivy, to the Church of Wringlington, who was thereto admitted, instituted and induced within that time, which was a month before the Defendant was deprived for not reading the **Articles** in the Church of Elme.

Where,

1. That his not retaining the first, is no effect nor consequent of his losing the second.

But the first was lost because he accepted a second, and the right Patron thereupon presented to the first; so as he lost the first, whilst he was, and for being, lawful Incumbent of the second, and therefore could be no effect nor consequent at all proceeding from his loss of the second, by not reading the Articles after, more than if he had lost the second by Deprivation for Heresie, or other cause.

2. The Clause of 13. is not, That all Admissions, Institutions and Inductions to Benefices, where any person is deprived by virtue of that Act, shall be void as if they never were; for so shoud the Clause have been to warrant the Objection made at the Bar.

But the Clause is, That all Admissions, Institutions and Inductions made contrary to any Provision of the Act, shall be void; as if they never were.

But Higden's Admission, Institution and Induction to the Church of Elme, was not contrary to any Provision of the Act, but every way legal; but had he not subscribed the Articles before the Ordinary, then his Admission, Institution and Induction had been contrary to the Provision of the Act, and so void, as if they never were.

The Chief Justice delivered the Opinion of the Court, and Judgment was given for the Plaintiff.

Bushell's

said *Penn* and *Mead*, together with divers other unknown persons, to the number of Three hundred, unlawfully and tumultuously assembled in *Grace-Church-Street in London*, to the disturbance of the Peace, whereof the said *Penn* and *Mead* were then indicted before the said Justices. Upon which Indictment the said *Penn* and *Mead* pleaded they were not guilty. For that they the said Jurors then and there the said *William Penn* and *William Mead* of the said Trespasses, Contempts, Unlawful Assemblies and Tu- muls, *Contra Legem hujus Regni Anglie*, & contra plenam & manifestam Evidentiam, & contra directionem Curie in materia Legis, hic, de & super pmissis eisdem Juratoribus versus pfectos *Will. Penn & Will. Mead*, in Curia hic aperte data, & declaratam de pmissis iis impositis in Indictamento pdicto acqui- verunt, in contemptum Dni Regis nunc, Legumque suarum, & ad magnum impedimentum & obstructionem Justiciae, necnon ad malum exemplum omnium aliorum Juratorum in consimili casu delinquentium. Ac super inde modo ulterius ordinatum est per Cur' hic quod pfectus *Edw. Bushell* capiatur & committatur Gaolæ dicti Dñi Regis de *Newgate*, ibidem remansirus quousque solvat dicto Dño Regi 40 Marcas p fine suo pdicto, vel deliberatus fuerit, per debitum legis cursum. Ac eodem *Edwardo Bushell* ad tunc & ibidem capto & commisso existente ad dictam *Gaelam de Newgate*, sub custodia pfect' *Jobannis Smith & Jacobi Edwards*, adiunc Vic. Civitatis *London* pdict', & in eorum Custodia in Gao- la pdict' existente & remanente virtute ordinis pdict' iidem *Joba- nes Smith & Jacobus Edwards*, postea in eorum exitu ab Officio Vic' Civitatis *London* pdict' scilicet 28 die *Septembris*, anno 22. supdicto, eundem *Edwardum Bushell* in dicta Gaola dicti Dñi Regis adtunc existentem, deliberaverunt nobis pfectis nunc Vice- comitibus Civitatis pdict' in eadem Gaola, salvo custodiendum, secundum tenorem & effectum Ordinis pdictar. Et quia pdictus *Edwardus* nondum solvit dicto Dño Regi pdictum finem 40 Mar- carum, nos iidem nunc Vicecomites corpus ejusdem *Edwardi* in Gaola pdicta, hucusque detinuimus, & hæc est causa captionis & detentionis pfecti *Edwardi*, cuius quidem corpus coram pfectis Ju- sticiariis paratum habemus.

The Writ of Habeas Corpus is now the most usual Remedy by which a man is restored again to his Liberty, if he have been against Law deprived of it.

too long to be made known, is to say the Law gives a Remedy which it will not let me have, or I must be wrongfully imprisoned still, because it is too long to know that I ought to be freed? What is necessary to an end, the Law allows is never too long. Non sunt longa quibus nihil est quod demere possis, is as true as any Axiom in Euclid. Besides, one manifest Evidence return'd had sufficed, without returning all the Evidence. But the other Judges were not of his mind.

If the Return had been, That the Jurors were committed by an Order of the Court of Sessions, because they did, minus justis, acquit the persons indicted.

Or because they did, contra Legem, acquit the persons indicted.

Or because they did, contra Sacramentum suum, acquit them.

The Judges cannot upon the present more judge of the legal cause of their Commitment, than they could if any of these causes, as general as they are, had been return'd for the cause of their Commitment. And the same Argument may be exactly made to justify any of these Returns, had they been made as to justify the present Return, they being equally as legal, equally as certain, and equally as far from possessing the Court with the Truth of the Cause. And in what condition should all men be for the just Liberty of their persons, if such causes should be admitted sufficient causes to remand persons to Prison?

To those Objections made by the Prisoner's Council against the Return, as too general.

1. It hath been said, That Institutum est quod non inquiratur de discretione Judicis.

Post 140. 2. That the Court of Sessions in London is not to be looked on as an Inferior Court, having all the Judges Commissioners. That the Court having heard the Evidence, it must be credited that the Evidence given to the Jury of the Fact was clear, and not to be doubted.

As for any such Institution pretended, I know no such, nor believe any such, as it was applied to the present Cause; but taking it in another, and in the true sense, I admit it for truth: that is, when the King hath constituted any man a Judge under him, his ability, parts, fitness for his place, are not to be reflected on, censured, defamed, or vilified by any other person, being allowed and stamp'd with the King's Approbation, to whom

¹ ^{Jac. Moore}
^{f. 839.} One Apsley, Prisoner in the Fleet, upon a Ha' Cor' was returned to be committed per considerationem Cur' Cancellar' p' contemptu eidem Curiæ illato; and upon this Retorn set at liberty.

In both these Cases no enquiry was made, or consideration had, whether the Contemps were to the Law Court or Equitable Court of Chancery, either was alike to the Judges, lest any man should think a difference might arise thence.

The reason of discharging the Prisoners upon those Returns, was the generality of them being for Contemps to the Court, but no particular of the Contempt expressed, whereby the King's Bench could judge whether it were a cause for Commitment or not.

And was it not as supposable, and as much to be credited, that the Lord Keeper and Court of Chancery did well understand what was a Contempt deserving Commitment, as it is now to be credited, that the Court of Sessions did understand perfectly what was full and manifest Evidence against the persons indicted at the Sessions, and therefore it needed not to be revealed to us upon the Retorn?

Hence it is apparent, That the Commitment, and Retorn pursuing it, being in it self too general and uncertain, we ought not implicitly to think the Commitment was re vera, for cause particular and sufficient enough, because it was the Act of the Court of Sessions.

^{Ans. 132.} And as to the other part, That the Court of Sessions in London is not to be resembled to other inferior Courts of Oyer and Terminer, because all the Judges are commissioned here (which is true) but few are there at the same time, and, as I have heard, when this Tryal was, none of them were present. However, Persons of great Quality are in the Commissions of Oyer and Terminer through the Shires of the Kingdom, and always some of the Judges; nor doth one Commission of Oyer and Terminer differ in its Essence, Nature, and Power from another, if they be General Commissions; but all differ in the Accidents of the Commissioners, which makes no alteration in their actings in the eye of the Law.

Another fault in the Retorn is, That the Jurors are not said to have acquitted the persons indicted, against full and manifest Evidence, corruptly, and knowing the said Evidence to be full and manifest against the persons indicted; for how manifest soever the Evidence was, if it were not manifest to them, and that they believ'd it such, it was not a finable fault, nor deserving Impt.

Imprisonment, upon which difference the Law of punishing Jurors for false Verdicts principally depends.

A passage in Bracton is remarkable to this purpose; concerning attainting Inquests.

Committit Jurator perjurium ppter falsum Sacramentum, ut si ^{Bract. 1.4. c.4.}
^{f. 288. b.} ex certa scientia aliter juraverit quam res in veritate se habuerit,
si autem Sacramentum fatuum fuerit licet falsum, tamen non com-
mittit perjurium licet re vera res aliter se habeat quam juraverat, &
quia jurat secundum conscientiam eo quod non vadit contra men-
tem. Sunt quidam qui verum dicunt, mentiendo, sed se pejerant----
quia contra mentem vadunt.

The same words, and upon the same occasion, are in effect ^{Flet. 1.5. c.22.}
^{f. 336. n. 9.} in Fleta. Committit enim Jurator perjurium quandoque ppter
falsum Sacramentum, ut si ex certa scientia aliter juraverit quam
res in veritate se habuerit secus enim ppter factum quamvis falsum.
And less any should think that these passages are to be under-
stood only of Jurymens Perjuries in foro conscientiae, it is
clearly otherwise by both those Books, which shew how, by the
discreet Examination of the Judge, the Error of the Jury, not
wilful, may be prevented and corrected, and their Verdict
reddited.

And in another place of Bracton, in the same Chapter; Judex ^{Bract. 1.4.}
enim sive Justiciarius ad quem pertinet examinatio, si minus dili- ^{f. 289. a.}
genter examinaverit, occasionem fibet perjurij Juratoribus. And
after,

Et si examinati cum justo deducantur errore dictum suum emen-
daverint, hoc bene facere possunt, ante judicium & impune, sed
post judicium non sine pena.

After these Authorities;

I would know, Whether any thing be more common, than
for two men, Students, Barristers, or Judges, to deduce contra-
ry and opposite Conclusions out of the same Case in Law? And
is there any difference that two men should infer distinct Con-
clusions from the same Testimony? Is any thing more known,
than that the same Author, and place in that Author, is for-
cibly urged to maintain contrary Conclusions, and the deci-
sion hard which is in the right? Is any thing more frequent
in the Controversies of Religion, than to press the same Text
for opposite Tenents? How then comes it to pass, that two
persons may not apprehend with Reason and Honesty, what a
plainly one thing, but in the apprehension of the other clearly
the

the contrary thing? Must therefore one of these merit Fine and Imprisonment, because he doth that which he cannot otherwise do, preserving his Oath and Integrity? And this often is the Case of the Judge and Jury.

Of this mind I conclude therefore, That this Return, charging the Prisoners to have acquitted Penn and Mead, against full and manifest Evidence first; and next, without saying that they did Turnor give know and believe that Evidence to be full and manifest against the no Opinion, indicted persons, is no cause of Fine or Imprisonment. because not at the Argu- ments.

And by the way I must here note, That the Verdict of a Jury and Evidence of a Witness are very different things, in the truth or falsehood of them. A Witness swears but to what he hath heard or seen generally, or more largely to what hath fallen under his senses: but a Juryman swears to what he can infer and conclude from the Testimony of such Witnesses, by the act and force of his Understanding, to be the Fact inquired after; which differs nothing in the Reason, tho' much in the Punishment, from what a Judge, out of various Cases consider'd by him, infers to be the Law in the Question before him.

Therefore Bracton,

Bra. f. 289. 2. Et licet narratio facti contraria sit Sacramento, & dicto precedenti, tamen falsum non faciunt Sacramentum licet faciunt fatuum Judicium, quia loquuntur secundum conscientiam quia falli possunt in Judiciis suis, sicut ipse Justiciarius.

There is one Objection, which hath been made by none as I remember, to justify this general Return, I would give Answer to.

A man committed for Treason or Felony, and bringing a Habeas Corpus, hath return'd upon it, That he was committed for High Treason or Felony; and this is a sufficient Return to remand him, tho' in truth this is a general Return; For if the specifical Fact for which the party was committed, were expressed in the Warrant, it might then perhaps appear to be no Treason or Felony, but a Trespass; as in the Case of the Earl of Northumberland, 5 H. 4. questioned for Treason in raising Power; the Lords adjudged it a Trespass, for the Powers raised were not against the King, but some Subjects.

Why then by like reason may not this Return be sufficient, tho' the Fact for which the Prisoners stood committed particularly expressed, might be no cause of Commitment?

The Cases are not alike; for upon a general Commitment Answ. for Treason or Felony, the Prisoner (the cause appearing) may pray for his Tryal, which ought not to be denied or delayed; and upon his Indictment and Tryal, the particular cause of his Imprisonment must appear, which proving no Treason or Felony, the Prisoner shall have the benefit of it. But in this Case, tho' the Evidence given were no full nor manifest Evidence against the persons indicted, but such as the Jury upon it ought to have acquitted those indicted, the Prisoner shall never have any benefit of it, but must continue in Prison when remanded, until he hath paid that Fine unjustly imposed on him, which was the whole end of his Imprisonment.

We come now to the next part of the Return, viz. That the Jury acquitted those indicted against the direction of the Court in matter of Law, openly given and declared to them in Court.

1. The words, That the Jury did acquit against the direction of the Court in matter of Law, literally taken, and de plano, are insignificant, and not intelligible; for no Issue can be joined of matter in Law, no Jury can be charged with the tryal of matter in Law barely, no Evidence ever was, or can be given to a Jury of what is Law or not; nor no such Oath can be given to, or taken by a Jury, to try matter in Law, nor no Attaint can lie for such a false Oath.

Therefore we must take off this veil and colour of words, which make a shew of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the Court in matter of Law, be, that if the Judge having heard the Evidence given in Court, (for he knows no other) shall tell the Jury upon this Evidence, The Law is for the Plaintiff, or for the Defendant, and you are under the pain of Fine and Imprisonment to find accordingly, then the Jury ought of duty so to do: Every man sees that the Jury is but a troublesome delay, great charge, and of no use in determining Right and Wrong; and therefore the Tryals by them may be better abolish'd than continued; which were a strange new-found conclusion, after a Tryal so celebrated for many hundreds of years.

For if the Judge, from the Evidence, shall by his own Judgment first resolve upon any Tryal what the Fact is, and so knowing the Fact, shall then resolve what the Law is, and order the Jury penally to find accordingly: what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all?

But if the Jury be not obliged in all Tryals to follow such Directions, if given, but only in some sort of Tryals, (as for instance, in Tryals for Criminal matters upon Indictments or Appeals) why then the consequence will be, tho' not in all, yet in Criminal Tryals, the Jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in Civil Tryals.

And how the Jury should in any other manner, according to the course of Tryals used, find against the Direction of the Court in matter of Law, is really not conceivable.

True it is, if it fall out upon some special Tryal that the Jury being ready to give their Verdict, and before it is given the Judge shall ask, Whether they find such a particular thing propounded by him? or whether they find the matter of Fact to be as such a Witness or Witnesses have deposed? and the Jury answer, They find the matter of Fact to be so; if then the Judge shall declare, The matter of Fact being by you so found to be, the Law is for the Plaintiff, and you are to find accordingly for him:

If notwithstanding they find for the Defendant, this may be thought a finding in matter of Law against the Direction of Court; for in that Case the Jury first declare the Fact as it is found by themselves, to which Fact the Judge declares how the Law is consequent.

And this is ordinary when the Jury find unerpectedly for the Plaintiff or Defendant, the Judge will ask, How do you find such a Fact in particular? And upon their Answer, he will say, Then it is for the Defendant, tho' they found for the Plaintiff; or è contrario; and thereupon they redifie their Verdict.

And in these Cases the Jury, and not the Judge, resolve and find what the Fact is.

Therefore always in discreet and lawful assistance of the Jury, the Judge's Direction is hypothetical, and upon supposition, and not positive, and upon coercion, viz. If you find the Fact thus (leaving it to them what to find) then you are to find for the Plaintiff; but if you find the Fact thus, then it is for the Defendant.

But in the Case propounded by me, where it is possible in that special manner, the Jury may find against the Direction of the Court in matter of Law, it will not follow they are therefore finable; for if an Attaint will lie upon the Verdict so given by them, they ought not to be fined and imprisoned by the Judge for that Verdict; for all the Judges have agreed upon a full

full Conference at Serjeants-Inn in this Case. And it was formerly so agreed by the then Judges, in a Case where Justice Hide had fined a Jury at Oxford, for finding against their Evidence in a Civil Cause, That a Jury is not finable for going against their Evidence where an Attaint lies; for if an Attaint be brought upon that Verdict, it may be affirmed and found upon the Attaint a true Verdict, and the same Verdict cannot be a false Verdict; and therefore the Jury fined for it as such by the Judge, and yet no false Verdict, because affirmed upon the Attaint.

Another Reason that the Jury may not be fined in such Case, is, Because until a Jury have consummated their Verdict, which is not done until they find for the Plaintiff or Defendant, and that also be entered of Record; they have time still of deliberation, and whatsoever they have answered the Judge upon an interlocutory Question or Discourse, they may lawfully vary from it if they find cause, and are not thereby concluded.

Whence it follows upon this last Reason, That upon Trials wherein no Attaint lies, as well as upon such where it doth, no Case can be invented wherein it can be maintained that a Jury can find, in matter of Law, nakedly against the Direction of the Judge.

And the Judges were (as before) all of Opinion, That the Return in this latter part of it, is also insufficient, as in the former, and so wholly insufficient.

But that this Question may not hereafter revive, if possible, it is evident by several Resolutions of all the Judges, That where an Attaint lies, the Judge cannot fine the Jury for going against their Evidence, or Direction of the Court, without other Misdemeanor.

For in such Case, finding against, or following the Direction of the Court barely, will not bar an Attaint; but in some Case, the Judge being demanded by, and declaring to, the Jury, what is the Law, tho' he declares it erroneously, and they find accordingly, this may excuse the Jury from the forfeitures; for tho' their Verdict be false, yet it is not corrupt; but the Judgment is to be reversed however upon the Attaint; for a man loseth not his Right by the Judge's mistake in the Law.

Therefore if an Attaint lies upon a false Verdict upon Judgment not Capital (as this is) either by the Common or Statute-Law, by those Resolutions the Court would not fine the Jury in this Case for going against Evidence, because an Attaint lay.

But

Ingersoll's C.
Cr. 35 El. 2.
309. n. 18.

But admitting an Attaint did not lie, (as I think the Law clear it did not, for there is no Case in all the Law of such an Attaint, nor Opinion but that of Thyrning's, 10 H. 4. Attaint 60, & 64. for which there is no Warrant in Law, tho' there be other specious Authority against it, touch'd by none that argued this Case)

The Question then will be, Whether before the several Acts of Parliament, which granted Attaints, and are enumerated in Reg. E 122. a. their order in the Register, the Judge by the Common-Law, in all Cases, might have fined the Jury finding against their Evidence, and direction of the Court, where no Attaint did lie, or could so do yet, if the Statutes which gave the Attaints were repealed?

If he could not in Civil Causes before Attaints granted in them, he could not in Criminal Causes, upon Indictment (wherein I have admitted Attaint lies not) for the fault in both was the same, viz. finding against Evidence and the direction of the Court, and by the Common-Law; the Reason being the same in both, the Law is the same.

That the Court could not fine a Jury at the Common-Law, where Attaint did not lie, (for where it did, is agreed he could not) I think to be the clearest Position that ever I consider'd, either for Authority or Reason of Law.

After Attaints were granted by Statutes generally; as, by Westm 1. c. 38. in Pleas Real, and by 34 E. 3. c. 7. in Pleas Personal, and where they did lie at Common-Law, (which was only in Writs of Assize) the Examples are frequent in our Books of punishing Jurors by Attaint.

But no Case can be offered, either before Attaints granted in general, or after, that ever a Jury was punished by Fine and Imprisonment by the Judge, for not finding according to their Evidence and his Direction, until Popham's time; nor is there clear proof that he ever fined them for that Reason, separated from other Misdemeanor. If Juries might be fined in such Case before Attaints granted, why not since? for no Statute hath taken that power from the Judge. But since Attaints granted, the Judges resolved they cannot fine where the Attaint lies, therefore they could not fine before. Sure this latter Age did not first discover that the Verdicts of Juries were many times not according to the Judges opinion and liking.

But the Reasons are, I conceive, most clear, That the Judge could not, nor can, fine and imprison the Jury in such Cases.

Without

Art. 148.

5. If they do follow his direction, they may be attainted, and the Judgment reversed, for doing of that which if they had not done they should have been fined and imprisoned by the Judge, which is unreasonable.

6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punished by distinct Judicatures for the same Offence, which the Common Law admits not.

Chevin and Paramours Case, 3 El. Dyer 201. a. 63. A Fine reversed in Banco Regis for Infancy, per inspectionem & per testimonium del 4 fide dignorum. After, upon examination of divers Witnesses in Chancery, the supposed Infant was proved to be of age, tempore finis levati, which Testimonies were exemplified, and given in Evidence after, in Communi Banco, in a Writ of Entry in the quibus there brought. And tho'

The progress it was the Opinion of the Court that those Testimonies were in this Writ of no force against the Judgment in the King's Bench, yet the Judgment for Jury found with the Testimony in Chancery, against direction Paramour the of the Court, upon a point in Law, and their Verdict after as Defendant, is firmed in an Attaint brought, and after a Writ of Right was at large 13 El. Dyer f. 301. brought, and Battle joyned.

n. 40. 7. To what end is the Jury to be returned out of the Vicinage whence the Cause of Action ariseth? To what end must Hundredors be of the Jury, whom the Law supposeth to have nearer knowledge of the Fact than those of the Vicinage in general? To what end are they challenged so scrupulously to the Array and Poll? To what end must they have such a certain Freehold, and be probi & legales homines, and not of Affinity with the parties concerned? To what end must they have in many Cases the View, for their exacter Information chiefly? To what end must they undergo the heavy punishment of the villainous Judgment, if after all this they implicitly must give a Verdict by the Dictates and Authority of another man, under pain of Fines and Imprisonment, when sworn to do it according to the best of their own knowledge?

A man cannot see by another's Eye, nor hear by another's Ear, no more can a man conclude or infer the thing to be resolved by another's Understanding or Reasoning; and tho' the Verdict be right the Jury give, yet they being not assured it is so from their own Understanding, are forsworn, at least in foro conscientiae.

9. It is absurd a Jury should be fined by the Judge for going against their Evidence, when he who fineth knows not what it is, as where a Jury find without Evidence in Court of either side, so if the Jury find upon their own knowledge; as the course is if the Defendant plead Solvit ad diem to a Bond proved, and offers no proof, the Jury is directed to find for the Plaintiff, unless they know payment was made of their own knowledge, according to the Plea.

14H. 7. f. 29.
per Vavasor
in Cam' Sac'
without con-
tradiction.
Hob. f. 227.

And it is as absurd to fine a Jury for finding against their Evidence, when the Judge knows but part of it; for the better and greater part of the Evidence may be wholly unknown to him; and this may happen in most Cases, and often doth, as in Graves and Short's Case.

Error of a Judgment in the Common-Bench: The Error as Graves v. P.
Signed was, The Issue being, Whether a Feoffment were made? Short, 40 El.
and the Jurors being gone together to confer of their Verdict, Cro. f. 616.
one of them shewed to the rest an Escrow p. perentibus, not given in Evidence by the parties, per quod, they found for the Demandant. Upon Demurrer, adjudged no Error; for it appears not to be given him by any of the parties, or any for them; it must be intended he had it as a piece of Evidence about him before, and shewed it to inform himself and his Fellows, and as he might declare it as a Witness that he knew it to be true. They resolved, If that might have avoided the Verdict, which they agreed it could not, yet it ought to have been done by Examination, and not by Error.

That Decantatum in our Books, Ad quæstionem facti non respondent Judices, ad quæstionem legis non respondent Juratores, literally taken, is true: For if it be demanded, What is the fact? the Judge cannot answer it; if it be asked, What is the Law in the Case? the Jury cannot answer it.

Therefore the parties agree the Fact by their pleading upon Demurrer, and ask the Judgment of the Court for the Law.

In Special Verdicts the Jury inform the naked Fact, and the Court deliver the Law; and so is it in Demurrs upon Evidence, in Arrest of Judgments upon Challenges; and often upon the Judges Opinion of the Evidence given in Court, the Plaintiff becomes Nonsuit, when if the matter had been left to the Jury, they might well have found for the Plaintiff.

But upon all General Issues, as, upon Not culpable pleaded in Trespass, Nil debet in Debt, Nul tort, Nul disseisin in Assize, Ne disturba pas in Quare Impedir, and the like: tho' it be matter of Law whether the Defendant be a Trespassor, a Debtor, disseisor or Disturber in the particular Cases in Issue, yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court; but find for the Plaintiff or Defendant upon the Issue to be tryed, wherein they resolve both Law and Fact complicately, and not the Fact by it self; so as tho' they answer not singly to the Question, What is the Law? yet they determine the Law in all matters where Issue is joined, and tryed in the principal Case, but where the Verdict is Special.

Hob. f. 227.

Devant 147,
149.

To this purpose the Lord Hobart in Needler's Case against the Bishop of Winchester, is very opposite, — Legally it will be very hard to quit a Jury that finds against the Law, either Common-Laws, or several Statute-Law, whereof all men were to take knowledge, and whereupon Verdict is to be given, whether any Evidence be given to them or not; as, if a Feoffment or Devise were made to one *imperpetuum*, and the Jury should find cross, either an Estate for Life, or in Feesimple, against the Law, they should be subject to an Attaint, tho' no man informed them what the Law was in that Case.

The legal Verdict of the Jury to be recorded, is, Finding for the Plaintiff or Defendant. What they answer, if asked to Questions concerning some particular Fact, is not of their Verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their Issue for the Plaintiff or Defendant, they may differ in the Motives wherefore, as well as Judges in giving Judgment for the Plaintiff or Defendant may differ in the Reasons wherefore they give that Judgment, which is very ordinary.

I conclude with the Statute of 26 H. 8. c. 4. That if any Jurors in Wales do acquit any Felon, Murderer or Accessary, or give an untrue Verdict against the King, upon the Tryal of any Traverse, Recognizance, or Forfeiture, contrary to good and pregnant Evidence ministred to them by persons sworn before the King's Justiciar: That then such Jurors should be bound to appear before the Council of the Marches, there to abide such Fine or Ransom for their Offence, as that Court should think fit.

If Jurors might have been fined before by the Law for going against their Evidence in matters Criminal, there had been no cause for making this Statute against Jurors for so doing in Wales only.

Objections out of the Ancient and Modern Books.

A Juror kept his Fellows a day and night, without any ^{41. A. 1. pl. 35.} reason or assenting, and therefore awarded to the Fleet.

This Book rightly understood is Law; That he staid his Fellows a day and a night, without any reason or assenting, may be understood, that he would not at that time intend the Verdict at all, more than if he had been absent from his Fellows, but wilfully not find for either side: In this sense it was a Misdemeanor against his Oath, for his Oath was truly to try the Issue, which he could never do that resolved not to confer with his Fellows.

And in this sense it is the same with the Case 34 E. 3. where ^{34 E. 3. Br. tit. Jurors, n. 46.} Twelve being sworn, and put together to treat of their Oath, did, one secretly withdrew himself, and went away, for which he was justly fined and imprisoned; and it differs not to withdraw from a man's duty by departing from his Fellows, and to withdraw from it tho' he stay in the same Room; and so is that Book to be understood.

But if a man differ in judgment from his Fellows for a day and a night, tho' his Dissent may not be as reasonable as the Opinion of the rest that agree, yet if his Judgment be not satisfied, one disagreeing can be no more criminal than four or five disagreeing with the rest.

2. A Juror would not agree with his Fellows for two days, ^{41. A. 1. pl. 11.} and being demanded by the Judges, If he would agree? said, He would first die in Prison; whereupon he was committed, and the Verdict of the Eleven taken; but upon better Advice the Verdict of the Eleven was quash'd, and the Juror discharged without Fine; and the Justices said, The way was to carry them in Carts until they agreed, and not by fining them; and as the Judges err'd in taking the Verdict of Eleven, so they did in imprisoning the Twelfth. And this Case makes strongly that the Juror was not to be fined who disagreed in Judgment only.

Therefore perhaps it may be an Offence, as of a Witness refusing his Testimony, not to find an Office for the King, when clear proof is made of the matter of Fact; but if proof be not made at all, or be altogether doubtful, or that the matter be matter of Law, the Inquest may find an Ignoramus, which a Jury upon a Tryal can never do. But of this I shall say no more, it concerning not the Case in question.

Presidents. That the Court of Common-Pleas, upon *Habeas Corpus*, hath discharged persons imprisoned by other Courts, upon the Insufficiency of the Return only, and not for Privilege. *

² Jones 13, 14. ⁵ Jac. Sir A. ⁵ Roper's case. ¹¹ Rep. Sir W. ¹² Chaney's C. ¹³ E. Thicknes Case, 12 Rep. 8 Jac.

Sir Anthony Roper, committed by the High Commission Court, discharged absolutely in the Common-Pleas, as unlawfully committed and detained, without any mention of Privilege.

George Milton, imprisoned for Contempt, scandalous Words of the Court, and convicted of Drunkenness; the Causes resolved insufficient, and therefore dimittitur à Prisone, and the Gaoler discharged of him; but he gave Bail to attend the pleasure of the Court.

⁴ Car. 1. **Elizabeth Ash, committed by the High Commission, prælencinio, in like manner discharged; the Cause being insufficient to detain her in Prison, or to hinder her from the Privilege of that Court, but no other mention of Privilege; put in Bail.**

⁷ Jac. **Richard Hayes, for refusing to do Penance as enjoyned, committed by the High Commission; the Cause judged insufficient to commit, but gave Bail as before; he demanded a Habeas Corpus, by reason of Privilege.**

But it is to be observed, That Privilege lies only where a man is Officer of the Court, or hath a prior Suit in the Common-Pleas depending, and is elsewhere arrested to answer, and molested, that he cannot prosecute his Suit, he is then privileged justly, and without wrong, because his Prosecutor elsewhere might have sued, if he pleased, in the Common-Pleas.

All Privilege is either for Officers, Clerks, or Attorneys of the Court, not to be sued elsewhere; or for persons impleading or impleaded, having priority of Suit in the Common-Pleas, arrested or sued in other Jurisdictions; or for the Menial Servants of such Officers.

These Privileges are not detrimental to any, because whoever hath occasion to sue an Officer, or any other having priority of Suit as before, is not restrained to sue them in the Common-Pleas, but is restrained from suing elsewhere. And this is the true Privilege of the Court.

And the way of enjoying this Privilege was, by Writs of Privilege to supersede the Proceeding of other Courts against such who had the Privilege of the Common-Pleas, as is yet ordinary in the Cases of Attorneys, Officers and Clerks.

And in such Writs the Cause of Privilege is mentioned; and as to their Menial Servants, if not true, may be traversed; ^{21 H. 6. f. 20.} ^{22 H. 6. f. 38.} as, 22 H. 6. 38. Debt was brought against Baron & Feme, and ^{34 H. 6 f. 15.} a Supersedeas out of the Chancery was cast for the Baron, as Menial Servant to an Officer of Chancery; whereupon the Plaintiff said, it was contained in the Writ that the Husband ^{Vide Dyer 12 El. f. 287.} ^{Pl. 48.} was Menial Servant to R. J. del Chancery, whereas he was ^{Vid. the Su- perced. for} not his Menial Servant; and thereupon Issue was taken. But Clerks of the Quare if the Officers appearing of Record in the Court may ^{Court, & for Attorneys} be traversed?

Hence it follows, tho' Proceeding in other Courts against a person privileged in Banco might be superseded, yet it was ^{Reg. Jud. 24.2.} when the matter proceeded upon in such Courts might as ^{But now At-} well be prosecuted in the Common Bench: But if a privileged person in Banco were sued in the Ecclesiastical Courts, or before ^{torneys are in roll'd as} the High Commission, or Constable and Marshal, for things ^{well as Offi-} whereof the Common Pleas had no Conuinance, they could not supersede that Proceeding by Privilege. And this was the ancient reason and course of Privilege.

1. Another way of Privilege, by reason of Suit depending in a Superior Court, is, when a person impleading or impleaded, as in the Common-Bench, is after arrested in a Civil Action or Plaintiff in London, or elsewhere, and by Habeas Corpus is brought to the Common-Pleas, and the Arrest and Cause returned: if it appear to the Court, that the Arrest in London was after the party ought to have had the Privilege of the Common-Pleas, he shall have his Privilege allowed, and be discharged of his Arrest, and the party left to

prosecute his cause of Action in London in the Common-Pleas, if he will.

2. If the cause of the Imprisonment returned be a lawful cause, but which cannot be prosecuted in the Common-Pleas, as Felony, Treason, or some cause wherein the High Commission, Admiralty, or other Court, had power to imprison lawfully, then the party imprisoned, which did implead, or was impleaded in the Common-Bench before such Imprisonment, shall not be allowed Privilege, but ought to be remanded.

3. The third way is, when a man is brought by Ha' Cor' to the Court, and upon return of it, it appears to the Court that he was against Law imprisoned and detained, tho' there be no cause of Privilege for him in this Court, he shall never be by the Act of the Court remanded to his unlawful Imprisonment; for then the Court should do an act of Injustice, in imprisoning him de novo against Law, whereas the Great Charter is, Quod nullus liber homo imprisonetur nisi per legem terræ. This is the present Case, and this was the Case upon all the Presidents produced, and many more that might be produced, where upon Ha' Cor' many have been discharged and bailed, tho' there was no cause of Privilege in the Case.

This appears plainly by many old Books, if the reason of them be rightly taken: For, insufficient causes are as no causes returned; and to send a man back to Prison for no cause returned, seems unworthy of a Court.

9 H. 6. 54. 58. If a man be impleaded by Writ in the Common-Pleas, and is
Br. n. 5. after arrested in London upon a Plaintiff, there upon a Ha' Cor' he
14 H. 7. f. 6. shall have Privilege in the Common-Pleas, if the Writ upon which
n. 19. 9 E. 4. he is impleaded bear date before the Arrest in London, and be
47. n. 24. returned, altho' the Plaintiff in the Common-Pleas be Nonsuit,
12 H. 4. f. 21. Essoin'd, or will not appear, and consequently the Case of Pri-
n. 11. Br. vilege at an end, before the Corpus cum causa returned; but if
the first Writ be not returned, there is no Record in Court that
there is such a Defendant.

The like where a man brought Debt in Banco, and after for the same Debt arrested the Defendant in London, and became Nonsuit in Banco; yet the Defendant, upon a Ha' Cor', had his Privilege, because he had cause of Privilege at the time of the Arrest, 14 H. 7. 6. Br. Privilege, n. 19.

The like Case, 9 E. 4. where a man appeared in Banco, by a Capi corpus, and found Mainprise, and had a day to appear in Court, and before his day was arrested in London, and brought a Corpus cum causa in Banco Regis, at which day the Plaintiff be-
came

came Nonsuit, yet he was discharged from the Serjeant at London, because his Arrest there was after his Arrest in Banco, and consequently unlawful, 9 E.4. f. 47. Br. Privil. 24. and a man can not be imprisoned at the same time lawfully in two Courts. Coke Magna Charta, £. 53, & 55.

The Court of King's Bench cannot pretend to be the only discharging of Prisoners upon a Habeas Corpus, unless in case of Privilege, for the Chancery may do it without question.

And the same Book is, That the Common-Pleas or Exchequer ; Mod. 198; may do it, if upon Return of the Habeas Corpus it appear the Imprisonment is against Law.

At Ha' Cor' may be had out of the King's Bench or Chancery, Mic. C. 2. Coke f. 55. tho' there be no Privilege, &c. or in the Court of Common-Pleas or Exchequer, for any Officer or privileg'd person there; upon which Writ the Gaoler must return by whom he was committed, and the cause of his Imprisonment; and if it appeareth that his Imprisonment be just and lawful, he shall be remanded to the former Gaoler; but if it shall appear to the Court that he was imprisoned against the Law of the Land, they ought, by Jones 13, 14. voice of this Statute, to deliver him; if it be doubtful and under consideration, he may be bailed. The King's Bench may bail, if they please, in all cases; but the Common Bench must remand, if the cause of the Imprisonment return'd be just.

The Writ de homine replegiando is as well returnable in the Common-Pleas as in the King's Bench.

All Prohibitions for incroaching Jurisdiction, issue as well out of the Common-Pleas as King's Bench.

Quashing the Order of Commitment upon a Certiorari, which the King's Bench may do, but not the Common-Pleas, is not material in this Case.

1. The Prisoner is to be discharged or remanded barely upon the Return, and nothing else, whether in the King's Bench or Common-Pleas.

2. Should the King's Bench have the Order of Commitment certified and quash'd before the Return of the Habeas Corpus, or after, what will it avail the Prisoners? they cannot plead Nul tiel Record in the one case or the other.

3. In all the Presidents shewed in the Common-Pleas, or in any that can be shewed in the King's Bench, upon discharging the Prisoner by Habeas Corpus, nothing can be shewed of quashing the Orders or Decrees of that Court that made the wrong Commitment.

Glanvill's C. 4. It is manifest, where the King's Bench hath upon Ha' Cor' Moore, f. 8, 6. discharged a Prisoner committed by the Chancery, the person hath been again re-committed for the same cause by the Chancery, and re-deliver'd by the King's Bench; but no quashing of the Chancery Order for Commitment ever heard of.

5. In such Cases of re-commitment, the party hath other and proper Remedy, besides a new Habeas Corpus, of which I shall not speak now.

6. It is known, that if a man recover in Assize, and after in a Re-disseisin, if the first Judgment be reversed in the Assize, the Judgment in the Re-disseisin is also reversed. So if a man recover in Waste, and Damages given, for which Debt is brought (especially if the first Judgment be reversed before Execution) it destroys the Process for the Damages in Debt, tho' by several Originals. But it may be said, That in a Writ of Error in this kind, the foundation is destroy'd, and no such Record is left.

Drury's Case 8 Rep. But as to that in Drury's Case, 8 Rep. an Outlawry issued, and Process of Capias upon the Outlawry; the Sheriff returned, Non est inventus, and the same day the party came into Court, and demanded Oyer of the Exigent, which was the Warrant of the Outlawry, and shewed the Exigent to be altogether uncertain and insufficient, and consequently the Outlawry depending upon it to be null. And the Court gave Judgment accordingly, tho' the Record of the Outlawry were never reversed by Error; which differs not from this Case, where the Order of Commitment is judicially declared Illegal, tho' not quashed or reversed by Error, and consequently whatever depends upon it, as the Fine and Commitment doth; and the Outlawry in the former Case was more the King's Interest, than the Fine in this.

The Chief Justice delivered the Opinion of the Court, and accordingly the Prisoners were discharged.

Hill.

Hill. 23 & 24 Car. 2. B.C. Rot. 615.

Edmund Sheppard Junior, Plaintiff; In Trespass, against Suff. ff.
George Gofnold, William Booth, William Haygard, and
Henry Heringold, Defendants.

*Barry & Orman v
10 d.d. 22. 1653.*
The Plaintiff declares for the forcible taking and carrying away, at Gyppin in the said County, the Eight and twentieth of January, 22 Car. 2. Five and twenty hundred and three quarters of a hundred of Wax of the said Edmund's, there found, and keeping and detaining the same under Arrest, until the Plaintiff had paid Forty nine shillings to them the said Defendants, for the delivery thereof, to his Damage of 40l.

Mod. 224.

Exte. 1. 1653.

The Defendants plead Not Culpable; and put themselves upon the Country, &c. The Jury find a Special Verdict.

1. That before the Caption, Arrest and Detention of the said Goods, and at the time of the same, Edmund Sheppard the younger was and is Lord of the Manor of Bawdsey in the said County, and thereof seized in his Demesne, as of Fee; and that he, and all those whose Estate he hath, and hath at the time of the Trespass supposed, in the said Manor, with the Appurtenances, time out of mind had, and accustomed to have, all Goods and Chattels wreck'd upon the high Sea, cast on shore upon the said Manor, as appertaining to the said Manor.

2. They further say, The said Goods were shipped in Foreign parts, as Merchandise, and not intended to be imported into England, but to be carried into other Foreign parts.

3. That the said Goods were wreck'd upon the High Sea, and by the Sea-shoar, as wreck'd Goods cast upon the Shoar of the said Manor, within the same Manor, and thereby the said Edmund seised as Wreck belonging to him as Lord of the said Manor.

They further find, That at the Parliament begun at Westminster the Five and twentieth day of April, the Twelfth of the King, and continued to the Nine and twentieth of December following, there was granted to the King a Subsidy called Poundage,

Of all Goods and Merchandises of every Merchant, natural-born Subject, Denizen and Alien, to be exported out of the Kingdom of *England*, or any the Dominions thereto belonging, or imported into the same by way of Merchandise, of the value of Twenty shillings, according to the particular Rates and Values of such Goods and Merchandises, as they are respectively rated and valued in the Book of Rates, entituled, *The Rates of Merchandise*, after in the said Act mentioned and referred to, to One shilling, &c.

Then they say, That by the Book of Rates, Wax inward, or imported, every hundred weight, containing One hundred and twelve pounds, is rated to Forty shillings, and hard Wax the pound Three shillings four pence.

They find, at the time of the Seizure of the Goods, That the Defendants were the King's Officers, duly appointed to collect the Subsidy of Poundage by the said Act granted; And that for the Duty of Poundage, not paid at the said time, they seised and arrested the said Goods until the Plaintiff had paid them the said fine of Forty nine shillings.

But whether the Goods and Chattels aforesaid, so as aforesaid wreck'd, be chargeable with the said Duty of Poundage or not, they know not.

And if not, They find the Defendants Culpable, and assess Damages to the Plaintiff to Nine and forty shillings, ultra miseras & custagia.

And if the said Goods be chargeable with the said Duty, They find the Defendants Not culpable.

It is clear, That formerly, in the times of Henry the Eighth, Queen Mary, and Queen Elizabeth, it was supposed that some Customs were due by the Common-Law, (wherein the King had an Inheritance) for certain Merchandise to be transported out of the Realm; and that such Customs were not originally due by any Act of Parliament. So is the Book, 31 H. 8.

It was the Opinion likewise of all the Justices in the Chequer Chamber, when Edward the Sixth had granted to a Merchant Alien, that he might transport or import all sorts of Merchandise, not exceeding in the value of the Customs and Subsidies thereof Fifty pounds, paying only to the King, his Heirs and Successors, p Customis Subsidis, & oneribus quibuscunque, of such Merchandises, so much, and no more, as any English Merchant was to pay.

That this Patent remained good for the old Customs, where- in the King had an Inheritance by his Prerogative, but was void by the King's death, as to Goods customable for his life only, by the Statute of Tonnage, &c.

So upon a Question raised upon occasion of a new Imposition laid by Queen Mary upon Clothes, the Judges being consulted about it, 1 Eliz. the Book is,

Nota, That English Merchants do not pay at Common Law a Inst. any Custom for any Wares or Merchandises whatever, but three, that is, Wools, Woolfells, and Leather; that is to say, *pro quolibet sacco Lane continent' 26 pierres, & cibescun pierr 14 pound, un demy Marke*, and for three hundred Woolfells half a Mark, and for a Last of Leather Thirteen shillings four pence; and that was equal to Strangers and English Merchants.

This was, in those several Reigns, the Opinion of all the Judges of the times; whence we may learn how fallible even the Opinion of all the Judges is, when the matter to be resolved must be cleared by Searches not common, and depends upon Cases not vulgarly known by Readers of the Year-Books.

For since these Opinions, it is known, those Customs, cal. Post 407. led the Old, or Antiquæ Custumæ, were granted to King Edward the First, in the third year of his Reign, by Parliament, as a new thing, and was no Duty belonging to the Crown by the Common Law.

2. This Seizure and Arrest appears by the Special Verdict to be for Poundage, according to the Book of Rates, by the Statute made the twelfth of the King, cap. 4. which gives Two shillings to the King for every hundred weight of Wax, and therefore not for any other Duty.

3. At the Common-Law, Wreck'd Goods (as these are found to be) could not be chargeable with Custom (if other Goods were) for at the Common-Law all Wreck was wholly the King's, and he could not have a small Duty of Custom out of that which was all his own: And by Westminster the first, Where Wreck belongeth to another than to the King, he shall have it in like manner, that is, as the King hath his.

It remains clear then, that Wax is a Merchandise subject to pay the Duty of Poundage by, and according to, the Act of the twelfth of this King, and not otherwise.

The Question then before us (being narrowed) will be, Whether Wax, or any other Goods subject to the Duty of Tonnage and Poundage by the Act and Book of Rates the twelfth of the King, shipp'd in Foreign Parts, as Merchandise not intended for England, but for other Foreign Parts, proving to be Wreck, and cast by the Sea upon a Manor to which Wreck belongs by Prescription, ought to answer the Duty of Tonnage and Poundage, as if imported as Merchandise in Ships, and not as Wreck: for if any kind of Merchandise wreck'd be subject to the Duty, all Merchandise mentioned in the Book of Rates is.

To resolve this Question, I shall observe, that all Wreck cast on shoar in the Kingdom, must be conceived as Goods imported; for tho' Goods exported may be wreck'd at Sea equally as Goods to be imported, yet Goods exported, if wreck'd, are not cast upon any shoar of the Kingdom as Wreck, under the notion of being Exported, but under the notion of being some way Imported.

So as in this Question of Wreck, to speak of any Goods or Merchandise, quatenus Exported, will be useless.

And because the Resolution of this Case depends upon the words and intendment of the Act of 12th of the King, cap. 4. And that if any Merchandise in kind, subject to the Duties by that Act, proving Wreck, cast on shoar, may be charged with the Duty, every Merchandise within the Act, proving Wreck, will be charged with it; and if any wreck'd Goods be free, all wreck'd Goods are free; for the Act makes no difference in the kinds or species of the Merchandise.

West. 1. c. 4.
Vid. Stat.

Molloy 241,
242.

I shall therefore recite some Clauses of the *Act*. The first 12 Car. 2. c. 4. §, That there is given to the King of every Tun of Wine of the growth of *France*, or of any the Dominions of the *French* King, that shall come into the Port of *London*, and the Members thereof, by way of Merchandise, by your natural-born Subjects, the Sum of Four pounds and ten shillings of current *English* Money, and so after that rate. And by Strangers and Aliens Six pounds of like Money.

And of every Tun of like Wines, which shall be brought into all and every the other Ports and places of this Kingdom, and the Dominions thereof, by way of Merchandise, by your natural-born Subjects, the Sum of Three pounds ; and by Aliens Four pounds and ten shillings.

From those words I observe, That Wines liable to pay Tonage by the *Act*, must have these Properties :

1. They must be Wines which shall come or be brought into the Ports and places of the Kingdom.

2. They must come or be brought into such Ports or places as Merchandises, that is, for sale, and to that end ; for no other conception can be of Goods brought as Merchandise.

3. They must come and be brought as Merchandise, and for sale, by the King's natural-born Subjects, or by Strangers and Aliens, as distinguished from the natural Subjects.

4. The Duty payable to the King is to be measured by the quality of him that imports the Commodity ; that is, if the Importer be a natural Subject, he pays less to the King ; and if an Alien, more.

5. All those Wines, charged with the Duty by the *Act*, so to come or be brought into the parts or places of the Kingdom, are to be Foreign ; as, of the growth of France, the Levant, Spain, Portugal, Rhenish Wines, or of the growth of Germany.

1. Whence it follows, that Wines of Foreign growth, and which by their kind are to pay Duty, if they shall come or be brought into the parts or places of the Kingdom, neither by the King's natural Subjects nor by Aliens, they are not chargeable with the Duties of this *Act*.

2. If they be not brought into the Ports and places of the Kingdom as Merchandise, viz. for sale, they are not chargeable with the Duty.

But Wines, or other Goods, coming or brought into the Realm as Wreck, are neither brought into the Kingdom by any the King's natural Subjects, nor by any Strangers, but by the Wind and Sea; for such Goods want a Proprietor until the Law appoints one.

3. Wreck'd Goods are not brought into the Kingdom, being cast on shoar, as Merchandise, viz. for sale, but are as all other the Native Goods of the Kingdom, indifferent in themselves, for sale, or other use, at the pleasure of the Proprietor.

4. All Goods, Foreign or Domestick, are in their nature capable to be Merchandise, that is, to be sold; but it follows not thence, that wheresoever they are brought into the Kingdom, they are brought as Merchandise, and to be sold, or should pay Custom; for they are transferred from place to place more for other uses than for sale.

Now are Goods which are brought to the Markets of the Kingdom to the end to be sold, therefore to pay Custom; for so all the Goods of the Kingdom would be customable: but they must be Goods brought ab extra, within the intention of the Act, or for Exportation to be carried out of the Kingdom.

5. All Goods charged with the Duties of the Act, must be proprietied by a Merchant natural-born or Merchant Alien, and the greatest or less Duty is to be paid, as the Proprietor is an Alien or Native Merchant; for so are the words of the Act in the Clause for Poundage of all manner of Goods and Merchandise of every Merchant natural-born Subject, Denizen and Alien, to be brought into the Realm, of the value of every Twenty shillings of the same Goods, according to the Book of Rates.

But wreck'd Goods are not the Goods of any Merchant, natural-born, Alien or Denizen, whereby the Duty payable should be either demanded, distinguished or paid.

Therefore a Duty impossible to be known can be no Duty; for civilly, what cannot be known to be, is as that which is not.

Grotius 1. 2. cap. 10. §. 11. And it is a poor shift to say, The Lord of the Manor, who hath the Wreck, is Merchant Proprietor; for if so, Is he an Alien Merchant Proprietor, or a Native?

If he be a natural Subject, (as he must be, having his Manor) he cannot be an Alien, and consequently the King can have no Alien Duty of wreck'd Goods; but Goods intended by the Act to be charged with the Duty, might be indifferently the Goods of Aliens or Natives. But to clear this more, put the Case,

The Act had only charged Merchandise imported by Aliens, and not by Natives, with the Duty;

Then the King could have had no Duty from wreck'd Goods at all; for they could not be the Goods of an Alien Merchant: Nor is Wreck brought into the Manor by the Lord, more than a Waif or Estray is, which is brought thither by him, is no Waif or Estray.

Besides, it is clear, the Lord of a Manor is no more a Merchant, Native or Alien, by reason of the Property he hath in Wreck Goods, than he is a Merchant, Native or Alien, by the Property he hath in his Horses or Cows; for his Property in a Wreck is not qua Merchant of any kind, but qua Lord of his Manor; and every Proprietor of Goods, by what Title soever, is as much Merchant as he.

6. All Goods subject to the Duty of Tonnage and Poundage, may be forfeited by the Disobedience and Misbehaviour of the Merchant-Proprietor, or those trusted by him, by the Act: The words are, If any Merchandise, whereof the Subsidies aforesaid shall be due, shall at any time be brought from the parts beyond the Sea into any Port, Place or Creek of this Realm, by way or Merchandise, and unshipped to be laid on Land, the Duties due for the same not paid, nor lawfully tendered, nor agreed for, according to the true meaning of this Act, then the same Goods and Merchandises shall be forfeit to your Majesty.

1. But wreck'd Goods cannot be imported into any Creek or Place of the Realm by way of Merchandise, and unshipped to be laid on Land; for if so imported and unshipped, to be laid on Land, it is no Wreck, and therefore are not Goods forfeitable by the Misbehaviour of any within the Act, and consequently not Goods intended to be charged with the Duties by the Act.

2. By this Clause the Owner or Proprietor of Goods chargeable with the King's Duty is to pay or agree for the Duty with the Customers before the unshipping or landing of the Goods, else they are forfeited.

Et sunt alio quendam que nullius bonis offe dicuntur sicut Wreckum Maris, grossus pescis, &c.
Bract. l. 3. de Coron. f. 120.
c. 3. n. 4.
Constable's
Case, 5 Rep.
f. 108. b.

But wreck'd Goods are cast on Land, and consequently land-ed, having no Owner or Proprietor, and therefore the Duty impossible to be paid or agreed for before their landing; and when so landed, and not before, the Law makes the King or Lord of the Manor their Proprietor; but not fully neither, until after a year and a day allowed to the first Owners to claim them, if any such be, by Stat. Westminster the First, cap. 4.

Whence it follows, That Wrecks should be rather forfeited to the King (which is not pretended) as Goods landed (the King's Duty not paid or agreed for) then seized until payment were according to the Act.

3. By this Clause, Imported Goods, intended to be charged by the Act, are Goods to be brought from the parts beyond the Seas.

And therefore also wreck'd Goods are not to pay the Duty; for the Native Commodities of the Kingdom, Shipwreck'd in their passage by Sea for Exportation, may be imported into the Realm as Wreck, yet never brought from the parts beyond the Sea, as the Clause intends Goods charged should be.

4. Goods cast into the Sea to unburden a Ship in a Storm, and never intended for Merchandise, are Wreck, when cast on shoar without any Shipwreck.

5. Goods derelict, that is, deserted by the Owners, and cast into the Sea, which happens upon various occasions, as coming from infested Towns or places, and for many other respects, will be Wreck if cast on shoar afterwards, tho' never purposed for Merchandise: (But Goods cast over-board to lighten a Ship, are not by Bracton, nor from him in Sir H. Constable's Case, esteemed Goods derelict; which is a Question not thoroughly examined.) Si autem ea mente ut nolit esse Dominus, aliud erit per Bract.

But by all the Clauses of the Act, Goods imported into the Realm as Merchandise only are to pay the King's Subsidy, therefore not Wreck imported, and not as Merchandise.

Bract. l. 2.
f. 41. b. n. 3.

Bract. l. 2.
f. 41. b. n. 3.
Constable's
Case, 5 Rep.
Bract. l. 3. de Coron. c. 3. n. 5
f. 120. a.
more fully.

6. If a Law were made, That Horses and Oxen brought to Market to be sold, should pay the King a Poundage of their value, and a Horse or Ox coming to Market happen to stray, and be seized in a Manor that had Strays, and there used according to the Law for Strays, until a year and a day were past, without claim of the Owner, whereby the Property of the Horse or Ox was altered, and the Lord of the Manor had gained it: will any man say Poundage should be paid for this Horse or Ox to the King, for being brought to Market to be sold? And the Case is the same, or harder, to pay Poundage for Wreck.

It remains that some Objections be cleared.

First, It is said, That by Fraud of the Merchant, or his Agents, and the Lord of the Manor, Goods not Shipwreck'd at all may be cast over-board, so as to be cast on shoar on the Manor by the Tide, and so the King's Duty avoided by confederacy.

1. This Supposal is remote, and cannot be of some Wrecks possible; as, of Wrecks of derelict Goods, or of Goods cast into the Sea to unburden a Ship.

2. If the Fraud appear, there is no Wreck, and the King will be righted. But to charge a legal Property, which the Lord of the Manor hath in a Wreck, with payments, because a Fraud may be possible, but appears not, will destroy all Property; for what appears not to be, must be taken in Law as if it were not.

The second Objection is, That the King's Officers by Usage have had in several Kings times the Duties of Tonnage and Poundage from Wrecks.

1. We desired to see ancient Presidents of that Usage, but could see but one in the time of King James, and some in the time of the last King, which are so new, that they are not considerable.

2. Where the penning of a Statute is dubious, long Usage is a just medium to expound it by; for *Jus & Norma loquendi* is governed by Usage. And the meaning of things spoken or written must be, as it hath constantly been received to be by common Acceptation.

But

But if Usage hath been against the obvious meaning of an Act of Parliament, by the vulgar and common acceptation of the words, then it is rather an Oppression of those concerned, than an Exposition of the Act, especially as the Usage may be circumstanced.

As for instance: The Customers seize a man's Goods, under pretence of a Duty against Law, and thereby deprive him of the use of his Goods until he regains them by Law, which must be by engaging in a Suit with the King; rather than do so, he is content to pay what is demanded for the King. By this Usage all the Goods in the Land may be charged with the Duties of Tonnage and Poundage; for when the Concern is not great, most men (if put to it) will rather pay a little wrongfully, than free themselves from it over-chargeably.

And in the present Case, the genuine meaning of the words and purpose of the Act, is not according to the pretended Usage, but against it, as hath been shewed: Therefore Usage in this Case weighs not.

The third Objection is from the words, Imported and brought into the Realm, or Dominions thereof, and that Wrecks are Goods and Merchandises imported into the Realm, and therefore chargeable with the Duty.

There are no Goods (as hath been said) but may in a sense be termed Merchandise, because all Goods may possibly be sold, and when sold, or intended to be, they are Merchandise; and in that sense wreck'd Goods are Merchandise, and so are all Goods else.

It is also true, that the Goods in question are by the Verdict found to be shipt in Foreign parts, as Merchandise, but not intended to be brought into England, but to be carried to some other Foreign parts (so are the words.)

But by the words, or some other Foreign parts, they might be intended to be carried as Merchandise into some Foreign parts which are of the King's Dominions, or of the Dominions of the Kingdom of England, for the Act mentions both.

And the Act limits the Duty, not upon Goods in the former sense, but upon Goods brought by way of Merchandise, by Natives or Aliens, into any the King's Dominions, which must be intended his Dominions as of the Crown of England; for nothing could be enacted here concerning his Dominions not of the Crown of England.

But

But the Verdict is uncertain, whether they were to be carried to Foreign parts of the Dominions of England, or into parts not of the Dominion of England; nor follows it, because Goods were intended to be sold, (that is, as Merchandise) in a place where good Market was for them, that they were intended to be sold at any other place, where no Profit could be made, or not so much, or where such Goods were perhaps prohibited Commodities; therefore the words of the Act, brought as Merchandise, must mean that the Goods are for Merchandise at the place they are brought unto.

And Goods brought or imported any where as Merchandise, or by way of Merchandise, that is, to be sold, must necessarily have an Owner to set and receive the Price for which they are sold, unless a man will say that Goods can sell themselves, and set and receive their own Prices.

But wreck Goods imported or brought any where, have no Owner to sell or prize them at the time of their Importation, and therefore are not brought by way of, or as Merchandise to *England*, or any where else.

Secondly, Tho' in a loose sense inanimate things are said to bring things; as, in certain Seasons, Rain to bring Gras; in other Seasons, some Winds to bring Snow and Frost; some Storms to bring certain Fowl and Fish upon the Coasts.

Yet when the bringing in or importing, or bringing out and exporting, hath reference to acts of deliberation and purpose; as, of Goods for sale, which must be done by a rational Agent, or when the thing brought requires a rational Bringer or Importer; as, be it a Message, an Answer, an Accompt, or the like: no man will say, that things to be imported or brought by such deliberative Agents, who must have purpose in what they do, can be intended to be imported or brought by casual and insensible Agents, but by Persons, and Mediums, and Instruments proper for the actions of reasonable Agents.

Therefore we say not, That Goods drowned or lost in passing a Ferry, a great River, an Arm of the Sea, are exported, tho' carried to Sea; but Goods exported are such as are convey'd to Sea in Ships, or other Naval Carriage of man's artifice; and by like reason Goods imported, must not be Goods imported by the Wind, Water, or such inanimate means, but in Ships, Vessels, and other Conveyances used by reasonable Agents; as, Merchants, Mariners, Sailors, &c. Whence I conclude, That Goods or Merchandise imported within the meaning of the Act, can only be such as are imported with deliberate.

deliberation, and by reasonable Agents, not casually, and without reason; and therefore Wreck'd Goods are no Goods imported within the intention of the Act, and consequently not to answer the King's Duties; for Goods, as Goods, cannot offend, forfeit, unlade, pay Duties, or the like, but Men, whose Goods they are. And Wreck'd Goods have not Owners to do these Offices, when the Act requires they should be done; therefore the Act intended not to charge the Duty upon such Goods.

Judgment for the Plaintiff. The Chief Justice delivered the Opinion of the Court.

Hill.

Hill. 23 & 24 Car. 2. C. B. Rot. 695.

Richard Crowley Plaintiff, in a Replevin, against Thomas Swindles, William Whitehouse, Roger Walton, Defendants.

The Plaintiff declares, That the Defendants, the 30th of December, 22 Car. 2. at King's Norton, in a place there called Hurley-field, took his Beasts, four Cows and four Heifers, and detained them, to his Damage of Forty pounds. Cro. 420.

The Defendants defend the Force; and as Bailiffs of Mary Ashenhurst Widow, justifie the Caption; and that the place contains, and did contain when the Caption was supposed, 20 acres of Land in Kings Norton aforesaid.

That long before the Caption, one Thomas Greaves Esq; was seized of 100 acres of Land, and of 100 acres of Pasture in Kings Norton aforesaid, in the said County of Worcester; whereof the locus in quo is, and at the time of the Caption, and time out of mind, was parcel in his Demesne, as of fee, containing 20 acres.

That he long before the Caption, that is, 18 die Decembris 16 Car. 1. at Kings Norton aforesaid, by his Indenture in Writing under his Seal, which the Defendants produce, dated the said day and year, in consideration of former Service done by Edmund Ashenhurst to him the said Thomas, did grant by his said Writing to the said Edmund and Mary his Wife, one yearly Rent of 20 l. issuing out of the said 20 acres, with the appurtenances, by the name of all his Lands and Hereditaments situate in Kings Norton aforesaid.

Habendum the said Rent to the said Edmund and Mary, and their Heirs, after the decease of one Anne Greaves, and Tho. Greaves, Uncle to the Plaintiff, or either of them, which first should happen, during the lives of Edmund and Mary, and the longer liver of them, at the Feasts of the Annunciation of the B. Virgin Mary and St. Michael the Archangel, by equal portions: The first payment to begin at such of the said Feasts as should first happen next after the decease of the said Anne Greaves and Thomas the Uncle, or either of them.

A a

That

That if the Rent were behind in part or in all, it should be lawful for the Grantees, and the Survivor of them, to enter into all and singular the Lands in *Kings Norton* of the Grantor, and to distrain and detain until payment. By virtue whereof the said Edmund and Mary became seized of the said Rent in their Demesne, as of freehold, during their lives, as aforesaid.

The Defendants say further in fact, That after, that is to say, the last day of *February*, in the Two and twentieth year of the now King, the said *Anne Greaves* and *Thomas the Uncle*, and *Edmund the Husband*, died at *Kings Norton*.

That for Twenty pounds of the said Rent for one whole year, ending at the Feast of St. *Michael* the Archangel, in the Two and twentieth year of the King, unpaid to the said *Mary*, the Defendants justify the Caption, as in Lands subject to the said *Mary's* Distress, as her Bailiffs; And averr her to be living at *Kings Norton* aforesaid.

The Plaintiff demands Oyer of the Writing indented, by which it appears that the said Annuity was granted to Edmund and Mary, and their Assigns, in manner set forth by the Defendants in their Conuance.

But with this variance in the Deed: And if the aforesaid Yearly Rents of Ten Pounds, and of Twenty Pounds, shall be unpaid at any the days aforesaid, in part or in all, That it shall be lawful for the said *Edmund* and *Mary*, at any time during the joyn natural Lives of the said *Anne Greaves*, and *Thomas Greaves* the Uncle, if the said *Edmund* and *Mary*, or either of them, should so long live, and as often as the said Rents of Twenty Pounds, or any parcel, should be behind, to enter into all the said *Thomas Greaves* the Grantor's Lands in *Kings Norton* aforesaid, and to distrain.

Upon Oyer of which Indenture, the Plaintiff demurs upon the Conuance.

Two Exceptions have been taken to this Conuance made by the Defendants.

¹ Rolls 422. The first, for that it is said, The Rent was granted out of the twenty acres, being the locus in quo, by the name of all the Grantor's Lands and Hereditaments in *Kings Norton*, and that a per nomen in that Case is not good.

The

Scarpus & *So as the sense must run, That if the Rent were behind, it*
Handkinson *should be lawful to distrain during the joint Lives of Anne and*
37 El. Cro. f. *words Thomas Greaves, which was before it could be behind; for it*
420. *repugnant & could not be behind till the death of one of them. Therefore*
senseless to be rejected. *those words, during their joint natural Lives, being insensible,*
ought to be rejected. For words of known signification, but
so placed in the Context of a Deed, that they make it re-
pugnant and senseless, are to be rejected equally with words
of no known signification.

Judgment p Defendant. The Chief Justice delivered
the Opinion of the Court.

Tri.

Trin. 16 Car. 2. C. B. Rot. 2487. But
Adjudg'd Mich. 20 Car. 2.

Bedell versus Constable.

By the Act of 12 Car. 2. cap. 24. it is among other things Enacted, That where any person hath, or shall have, any Child or Children under the age of One and twenty years, and not married at the time of his death, it shall and may be lawful to and for the Father of such Child or Children, whether born at the time of the decease of the Father, or at that time *in ventre sa mere*; or whether such Father be within the age of One and twenty years; or of full Age, by his Deed executed in his life-time, or by his last Will and Testament in writing, in the presence of two or more credible Witnesses, to dispose of the Custody and Tuition of such Child or Children, for and during such time as he or they shall respectively remain under the age of One and twenty years, or any lesser time, to any person or persons in possession or remainder, other than Popish Recusants: And such disposition of the Custody of such Child or Children made since the 24th of February, 1645. or hereafter to be made, shall be good and effectual against all and every person or persons claiming the Custody or Tuition of such Child or Children, as Guardian in Soccage, or otherwise. And such person or persons, to whom the Custody of such Child or Children hath been, or shall be so disposed or devised as aforesaid, shall and may maintain an Action of Ravishment of Ward, or Trespass, against any person or persons which shall wrongfully take away or detain such Child or Children, for the Recovery of such Child or Children, and shall and may recover Damages for the same in the said Action, for the use and benefit of such Child or Children.

And such person or persons to whom the Custody of such Child or Children hath been, or shall be so disposed or devised, shall and may take into his or their Custody, to the use of such Child or Children, the Profits of all Lands, Tenements and Hereditaments of such Child or Children, and also the Custody, Tuition and Management

nagement of the Goods, Chattels, and Personal Estate of such Child or Children, till their respective Age of One and twenty years, or any lesser time, according to such Disposition aforesaid, and may bring such Action or Actions in relation thereto, as by Law a Guardian in Common Soccage might do.

By the Will is devised in these words;

I do bequeath my Son *Thomas* to my Brother *Robert Towray* of *Rickball*, to be his Tutor during his Minority.

Before this Act, Tenant in Soccage of Age might have disposed his Land, by Deed or last Will, in Trust for his Heir, but not the Custody and Tuition of his Heir; for the Law gave that to the next of Kin, to whom the Land could not descend.

But Tenant in Soccage under Age could not dispose the Custody of his Heir, nor devise or demise his Land in Trust for him in any manner: Now by this Statute he may grant the Custody of his Heir, but cannot devise or demise his Land in Trust for him for any time directly; for if he should, the Devise or Demise were as before the Statute (as I conceive) which is most observable in this Case.

I say directly he cannot, but by a mean, and obliquely, he may; for nominating who shall have the Custody, and for what time, by a consequent the Land follows, as an Incident given by the Law to attend the Custody, not as an Interest devised or demised by the party.

This difference is very material; for if the Father could devise the Land in Trust for him until his Son came to One and twenty, as he can grant the Custody, then, as in other Cases of Leases for years, the Land undoubtedly should go to the Executor or Administrator of him whom the Father named, for the Tuition and the Trust should follow the Land, as in other Cases where Lands are conveyed in Trust.

But when he cannot, ex directo, devise the Land in Trust, then the Land follows the Custody, and not the Custody the Land; and the Land must go as the Custody can go, and not the Custody as the Land can go.

As, where a House or Land belongs to an Office, or a Chamber to a Coronet, the Office or Coronet being granted by Deed, the House and Land follows as incident, or belonging, without Livery, because the Office is the principal, and the Land but pertaining to it.

Coke Litt.
f. 49. 2.
1 H. 7. 28.
8 H. 7. 4.
Plowd. Com.
169. 2.

A second Consideration is, That by this Act no new Custody is instituted, but the Office of Guardian, as to the Duty and Power of the place, is left the same as the Law before had prescribed and settled of Guardian in Soccage.

But the modus habendi of that Office is altered by this Act in two Circumstances. The first,

1. It may be held for a longer time, viz. to the age of the Heir of One and twenty, where before it was but to Fourteen.
2. It may be by other persons held; for before it was the Ant. 178. next of Kindred not inheritable, could have it; now who the Father names shall have it.

So it is, as if an Office grantable for life only before, should be made grantable for years by Parliament, or grantable before to any person, should be made grantable but to some kind of persons only.

The Office, as to the Duty of it, and its Essence, is the same it was: but the modus habendi altered.

If therefore this new Guardian is the same in Office and Interest with the former Guardian in Soccage, and varies from it only in the modus habendi, then the Ward hath the same legal Remedy against this Guardian as was against the old: but if this be a new Office of Guardianship, differing in its nature from the other, the Heir hath no Remedy against him at all in Law: for tho' this new Guardian be enabled to have such Actions as the old might have, yet this Act enables not the Heir to have like Actions, or any other against him, as he might against the Guardian in Soccage.

The intent of this Statute is to privilege the Father against common Right to appoint the Guardian of his Heir, and the time of his Wardship under One and twenty; but leaves the Heirs of all other Ancestors Wards in Soccage, as before: Therefore I hold,

1. That such a Special Guardian cannot transfer the Custody of the Ward by Deed or Will to any other.
2. That he hath no different Interest from a Guardian in Soccage, but for the time of the Wardship.
3. When an Act of Parliament alters the Common-Law, the meaning shall not be strained beyond the words, except in Cases of publick Utility, when the end of the Act appears to be larger than the enabling words. But by the words the Father only can appoint the Guardian, therefore the Guardian so appointed, cannot appoint another Guardian.

2. The Mother hath the same concern for her Heir as the Father hath: but she cannot by the Act name a Guardian, therefore much less can the Guardian named by the Father.

3. The Father cannot by the Act give the custody to a Papist: but if it may be transferred over by him whom the Father names, or by Act in Law go to his Executor or Administrator, it may come to a Papist, against the meaning of the Act.

4. Offices or Acts of personal Trust cannot be assign'd, for the Trust is not personal which any man may have.

Dyer 2 & 3
El. 1. 189. b. 5. At the Common-Law none could have the Custody and Marriage of a man's Son and Heir-apparent from the Father: yet the Father could not grant or sell the Custody and Marriage of his Heir-apparent, tho' the Marriage was to his own Benefit, as was resolved by the greater number of the Judges in the Lord Bray's Case, who by Indenture had sold for 800 l. the Custody and Marriage of his Son and Heir-apparent, in the time of Hen. 8. to the

Lord Audley, Chancellor of England,
Lord Cromwell, Lord Privy-Seal,
Sir William Paulet, Treasurer of the Household,
The Marquis of Winchester, Lord Treasurer.

Dyer supra
£.190. b. pl. 19. The Reason given is, That the Father hath no Interest to
Co. 7. 12. b. be granted or sold to a stranger in his eldest Son, but it is
Plowd. Com.
335. b. inseparably annexed to the person of the Father.

Two Judges differed, because an Action of Trespass would lie
for taking away a man's Heir-apparent and marrying him; whence they conclude he might be granted as a Chattel.

11 H. 4. f. 23. a.
Fitz. N. Br.
Tresp. f. 90. b.
Lett. G. f. 89.
Lett. O. But an Action of Trespass will lie for taking away ones Servant.

For taking away a Monk where he was cloyster'd in Castigationem.

Pro Uxore abducta cum bonis Viri; yet none of these are assignable.

By the Stat. of Westm the First, if the Guardian in Chivalry
West. 1. c. 48. made a Feoffment of the Ward's Lands in his Custody during
2 Inst. his Minority, the Heir might forthwith have a Writ of Novel disseisin against the Guardian and Tenant, and the Land recovered should be delivered to the next of kin to the heir, to be kept and accompted for to him at his full age.

This

This was neither Guardian in Soccage nor Chivalry, but a special Guardian appointed by the Statute, and such a Guardian could not assign over, nor should it go to his Executors by the express Book.

This Case likewise, and common experience proves, that Guardian in Soccage cannot assign, nor shall the Custody go to his Executors, tho' some ancient Books make some doubt therein.

For expressly by the Stat. of 52 H. 3. the next of Kin is to answer and be accountable to the Heir in Soccage, as this special Guardian is here by Westminster the first.

These several sorts of Guardians trusted for the Heir, could neither assign their Custody, nor did it go to their Executors, because the Trust was personal, and they had no Interest for themselves.

The Trust is as personal in this new Guardian, nor hath he any Interest in it for himself, and therefore he shall not assign it.

A Guardian in Soccage cannot transfer his Custody, because it is a personal Trust; but the Trust of this special Guardian is more personal, therefore that he shall transfer it, concludes strangely.

The Office of a Philizer is an Office of personal Trust to do the business of the Court, and not assignable, no Execution can be upon it.

Sir George Reynel's Case: An Office of Trust and Confidence cannot be granted for years, because then it might go to persons (that is, to Executors or Administrators) never trusted or confided in.

So is Littleton expressly, That all Offices of Trust, as Seward, Constable, Bedlary, Bailiffwick, must be personally occupied, unless they be granted to be occupied by a Deputy, and are not assignable.

And a more near or tenderer Trust cannot be, than the Custody and Education of a Man's Child and Heir, and preservation of his Estate.

It may be said, that in these Cases the Law doth particularly appoint the Guardians, and therefore no others can be: But in the Case at Bar the Father appoints the person, not the Law.

It is true, there is a difference in the Cases, but not to make the Trust more assignable in the one Case than the other.

v Sutton Where the Law appoints who shall be trusted, the Trust cannot be refused, as in the several Guardians before mentioned.
J. L. & Ellis b.

But where the Person names the Trustee, the Trust may be refused; but once accepted, it cannot be transferred to others, more than where the Law names the Trustee.

An Executor hath a private Office of Trust (for we speak not of publick) and is named by the Testator, not by the Law: therefore he may refuse, but cannot assign his Executorship.

But it is true, an Executor may make an Executor (due Circumstances observed) who shall discharge the first Testator's Trust; but the reason is, that after Debts paid, and Legacies, the Surplus of the Goods belongs to the Executor, *proprio jure*.

An Administrator hath a private Office of Trust; he cannot assign, nor leave it to his Executor; he is not named by the Intestate, but by the Law, in part for him, but not peremptorily; he may not claim it if he will, because it must pass through the Ordinary.

A man's Bailiff or Receiver are Offices of personal Trust, and not assignable: so is the Office of every Servant.

Inst. 49. b. An Arbitrator, or one authorised to sell a man's Land, to give Livery, or receive it, cannot assign; it is a personal Confidence.

1. A Custody is not in its nature Testamentary; it cannot pay Debts nor Legacies, nor be distributed as Alms.

2. It is not accountable for to the Ordinary, as Intestates Goods are.

3. The Heir ought to have a Guardian without interruption, but an Executor may be long before he proves the Will, and may at length refuse. An Administration, long before it be granted, and after, may be suspended by Appeal; and in these times the Ward hath no certain Guardian responsal for his Estate or Person.

Shoplands C. And where it may be said, that these are naked Authorities, and the persons have no Interest, but a Guardian hath Interest; he may lett and sett the Ward's Land during Minority, avow in his own name, grant Copyhold-Estates, and the like,

It is an Interest conjoyned with his Trust for the Ward, (I speak not here of equitable Trusts, without which Interest he could not discharge the Trust) but it must be an Interest for himself, which is transferrable, or shall go to his Executor.

*See i. Soley
5 ad. Ell. 445.*

All Executors and Administrators have Interest and Property necessary to their Trusts; for they may sell the Goods or Leases of the Testator or Intestate, without which they could not execute the Trust.

A Monk made an Executor might do the like, who in his own Right could have no Interest or Property.

But such Interest proves not that the Executors or Administrators may assign their Trust, or that it shall go their Executors; for it is agreed in that Case of Shopland, that such Interest as a Guardian in Soccage hath, shall not go to his Executor, but is annexed to his Person, and therefore not transferrable.

*Soccage may
demise his
Guardianship
and grant o-
ver his Estate,
N.B. f. 145 b.
Letter H.
quod nota.*

So as I take the sense of the Act, collected in most, to be,

Whereas all Tenures are now Soccage, and the next of Kin to whom the Land cannot descend is Guardian until the Heirs age of Fourteen: yet the Father, if he will, may henceforth nominate the Guardian to his Heir, and for any time, until the Heirs age of One and twenty; and such Guardian shall have like remedy for the Ward, as the Guardian in Soccage by the Common Law hath.

Another Exposition of this Act hath been offered, as if the Father did devise his Land by way of Lease, during the Minority of the Heir, to him to whom he gave the Custody in Trust for the Heir, and so the Land was assignable over, and went to the Executors, but followed with the Trust.

1. This is a forc'd Exposition, to carry the Custody to any Stranger to the Father or to the Child, or to any that may inherit the Land, contrary to the ancient and excellent Policy of the Law.

2. By such an Exposition, the Heir should have no Accompt of such a Lessee, as he may against a Guardian, but must sue in Equity; for this Statute gives Actions, such as Guardians might have, to him who hath the Custody, but gives none against him.

3. If such Lessee should give the Heirs Marriage, the Heir Co. Litt. f. 89. hath no Remedy, but the Guardian in Soccage shall accompt for what the Marriage was worth.

Stat. Malbr.
c. 17.

The Statute only saith, That such person nominated by the Father may take to his Custody the Profits of all Lands, Tenements and Hereditaments of such Child and Children, and also the Custody, Tuition and Management of the Goods, Chattels and Personal Estate of such Child or Children ; and may bring such Action in relation thereto, as a Guardian in Soccage might do.

None of which words will charge him with the value of the Marriage, if he had nothing for it.

N.B. f. 139. b.
Lett. H.

4. If the Heir be in custody of such a Lessee, and be Guardian by nearness of Kin to another Infant, the Guardian of the Heir by Law is Guardian to both: But such a Lessee hath no pretence to be Guardian of the second Infant by any word of the Act; for he is neither an Hereditament, or Goods, or Chattels of the first Infant.

As to the second part:

2 Leon. 221. If the Father, being of age, should devise his Land to J. S. during the Minority of his Son and Heir, in Trust for his Heir, and for his Maintenance and Education until he be of age,

This is no deviling of the Custody within this Statute, for he might have done this before the Statute.

If the Father, under age, should make such a Devise, it were absolutely void; for the same Syllables shall never give the Custody of the Heir by the Father under age, which do not give it by the Father which is of age.

But in both Cases a Devise of the Custody is effectual, and there is no reason that the Custody devised shall operate into a Lease, when a Lease devised shall not operate into a Custody, which it cannot do.

If a man devise the Custody of his Heir-apparent to J. S. and mentions no time, either during his Minority, or for any other time, this is a good Devise of the Custody within the Act, if the Heir be under Fourteen at the death of the Father, because by the Devise the Modus habendi Custodiam is changed only as to the Person, and left the same it was as to the time:

But if above Fourteen at the Father's death, then the Devise of the Custody is merely void for the incertainty.

For the Act did not intend every Heir shold be in Custody until One and twenty, Non ut tamdiu sed ne diutius, therefore he shall be in this Custody but so long as the Father appoints; and if he appoint no time, there is no Custody.

No man have power to make Leases for any term of years, not exceeding One hundred, and he demises Land, but expresseth no time, shall this therefore be a Lease for One hundred years? There is no reason it shold be a Lease for the greatest term he could grant, more than for the least term he could grant, or indeed for any other term under One hundred; therefore it is void for incertainty: And the Case is the same for the Custody.

For if the Father might intend as well any time under that, no Reason will enforee that he only intended that.

And to say he intended the Custody for some time, therefore since no other can be, it must be for that, will hold as well in the Lease, and in all other Cases of incertainty. If a man ^{Co. 5. 68. b.} devises Ten pounds to his Servant, but having many, none shall have it for the incertainty.

It may be demanded, If the Father appoint the Custody until the age of One and twenty, and the Guardian dye, what shall become of this Custody?

It determines with the death of the Guardian, and is a Condition in Law; and the same as if a man grant to a man the Stewardship of his Manor for Ten years, or to be his Bailiff, it is implied by way of Condition, if he live so long.

A Copyholder in Fee surrenders to the Lord, ad intentionem Dyer 8 Eliz. that the Lord shold grant it back to him for term of life, the ^{f. 251. pl. 90.} Remainder to his Wife till his Son came to One and twenty, Remainder to the Son in tail, Remainder to the Wife for life. The Husband died; the Lord at his Court granted the Land to the Wife till the Son's full age; the Remainders ut supra; the Wife marries, and dies Intestate; the Husband held in the Land; the Wifes Administrator, and to whom the Lord had granted the Land during the Minority of the Son, enters upon the Husband.

This Entry was adjudged unlawful, because it was the Wifes term; but otherwise it had been, if the Wife had been but a Guardian, or next Friend of this Land.

The like Case is in Hobart.

If it be insisted, that this new Guardian hath the Custody, ^{Baldur and Blackburn, f. 285. 17 Jac.} not only of the Lands descended or left by the Father, but of all

all Lands and Goods any way acquired or purchased by the Infant, which the Guardian in Soccage had not.

That alters not the Case; for if he were Guardian in Soccage without that particular power given by the Statute, he is equally Guardian in Soccage with it, and is no more than if the Statute had appointed Guardian in Soccage to have care of all the Estate of the Infant, however he came by it.

Besides, that proves directly that this new Guardian doth not derive his Interest from the Father, but from the Law; for the Father could never give him Power or Interest of or in that which was never his.

The Court was divided, *viz.* The Chief Justice and Justice *Wylde* for the Plaintiff; Justice *Tyrrell* and Justice *Arther* for the Defendant.

Hill

Hill. 19 & 20 Car. 2. C. B. Rot. 506.

Holden versus Smallbrooke.

His Trover and Conversion, and Not guilty pleaded, the Jury *Robinson* gave a Special Verdict to this effect, That Dr. *Mallory*, ^{see} *Chancery of the* *Barns & Crops* *Buyback & Sale* *7 Aug 1885* Prebendary of the Prebend of *Wolvey*, founded in the Cathedral of *Litchfield*, seized of the said Prebend, and one Messuage, one Barn, and the Glebe appertaining thereto, and of the Tythes of *Wolvey* in Right of his Prebend, *22 April, 13 Car. 2.* by Indenture demised to *Giles Astly* and his Assigns the said Prebend, together with all Houses, Barns, Tenements, Glebe-Lands and Tythes thereto belonging, for three Lives, under the ancient Rent of Five pounds ten shillings, *Astly* (being one of the Lives) died seized of the premisses; at whose death one *Taverner* was Tenant for one year (not ended) of the Demise of *Astly*, of the Messuage, Barn and Glebe-Lands, and in possession of them, whereupon the Plaintiff entred into the Messuage and Glebe, and was in the possession of the same, and of the Tythes, as Occupant. And afterwards *Frances Astly*, Relict of the said *Giles Astley*, enters upon the Messuage, and claims the same as Occupant, *in hoc verba*, *Frances Astly*, Widow of *Giles Astly*, enters upon the House, and claims the same, with the Glebe and Tythe, as Occupant; *Taverner* attorns to *Frances Astly*, and afterwards grants and assigns all his Estate in the premisses to the Plaintiff; afterward *Conquest*, the Husband of *Frances Astly*, took one Sheaf of Corn in the name of all the Tythes, and afterwards demised the Tythes to the Defendant. The Tythes are set forth, and the Defendant took them, whereupon the Plaintiff brought this Action.

Before I deliver my Opinion concerning the particular Questions before opened, arising upon this Record, I shall say somewhat shortly of Natural Occupancy and Civil Occupancy.

First opening what I mean by those terms, then briefly shewing their difference, as far only as is material to the Questions now before me,

Post 190.

I call Natural Occupancy the possession either of such natural things as are immovable, fix'd and permanent; as, Land, a Pool, River, Sea, (for a Sea is capable of Occupancy and Dominion naturally, as well as Land, and hath naturally been in Occupancy, as is demonstrated in Mr. Selden's *Mare Clausum at large*,) which lie unpossessed, and in which no other hath prior Right.

Of things natural and movable, either animate, as a Horse, a Cow, a Sheep, and the like, without number; or inanimate, as Gold, precious Stones, Grain, Honey, Fruit, Flesh, and the like, numberless also, wherein no man, until the possession thereof by Occupancy, had any other Right than every man had, which is as much as to say, wherein no man had Right, for that which is equally every man's Right, is no man's Right.

Whence it follows (for I shall not speak of the usage or extent of such a possession by natural Occupancy, it being a subject too large, and not necessary for my present purpose,) 1.

That there can be no Occupancy natural of any thing wherein another than the Occupant hath Right; for by the definition made, natural Occupancy is the first Right.

2. A Claim, without actual possession, cannot make a man a natural Occupant: For,

1. When a Claim is, cannot be possibly known to all concerned in the Occupancy of a natural thing; and what cannot be known, is (as to all effect of Right) as if it had not been; nor is there any Character of a natural Claim, but the possession and use of the thing; but civilly there may, either by word, or other sign agreed on.

2. The end of a natural Right to any natural Thing, is the separate use of the thing to a part of Mankind, which cannot be used by all Mankind; but if Claim only would give a Right to the things of nature, they might still remain as much without use after the Claim as before, which agrees not with the end of Nature in giving a Right to natural things.

3. If Claim could give a Natural Right, one might claim all things in the Universe not already appropriated, and might have done so in the beginning of Time, when nothing almost was appropriated.

Occupancy by the Law must be of things which have natural existence, as of Land or of other natural things, not of things which have their being and creation from Laws and Agreements of men; for there is no direct and immediate Occupancy of a Rent, a Common, an Advowson, a Fair, a Market, a Remainder, a Dignity, and the like.

o. Lit. f. 41. b. i. r. 41. El. f. L. p. 50. no. Ant. 188. There can be no Occupant of any thing that lieth in grant, and cannot pass without Deed, because every Occupant must claim by a *Que Estate*, and aver the Life of *Cestuy que vie*.

L. p. 50. no. Ant. 188. And in this the Civil Occupancy with us of Land agrees with Natural Occupancy, which must be of a thing that hath Natural Existence; and not only Legal.

Post 196. But altho' the Occupancy be always of a natural thing, yet the Occupant doth thereby by the Law enjoy several things many times that have their being by Law only, as an Occupant of Land may thereby enjoy a common Occupant of a House, Estovers of the Demesne Lands of a Manor, the Services and Advowsons appendant, which are not themselves natural things, but things created by Law; nor are they immediately and by themselves capable of Occupancy, but with reference to, and as Adjuncts of the Land; and herein the Civil Occupancy differs from the Natural.

Ibid. And the reason is clear, because the Occupancy of the Land, which ought not to lie void, doth not sever or separate any thing from the Land which the Law hath joined with it; and if it doth not separate from it that which is joined with it by Law, tho' that be not capable of Occupancy in it self, as an Advowson or Common, it must follow that such things continue joined or belonging to the Land as before, notwithstanding the Occupancy of the Land.

Co Lit. f. 41. b. Post 204. Co. Lit. 41. 3 Ant. 189. In Civil Occupancy the Land in Occupancy is charg'd with all the Servitude imposed by the first Lessor or by the Law; as,

1. To the payment of Rent.
2. To be subject to Waste.
3. To Forfeiture.
4. To other Conditions, wherein it differs from Land whereof a man is a Natural Occupant.

As to the Civil Occupancy of movable things, which are commonly termed Personal Things or Goods, there are few of those in our Law that have not a Proprietor (and consequently no Occupant can be of them;) Those which fall under Occupancy of that kind, are for the most part found in things ferre naturæ, whose acquisition is either per punctionem, as in *B. 1. l. 1. c. 1.* Fish, or per aucupium, as in Fowl, or per venationem, by Hunting. These do cedere occupanti communi Jure.

1. Pence

1. Hence it follows by way of Inference or Corollary, That there can be no primary and immediate Occupancy of a Tythe; for it is not in its own nature capable of Occupancy more than a Rent or Common is, and is in truth in its nature but a Rent; it cannot pass by it self, but by Deed, and as other things which lie in grant.

A second thing that follows out of the former premisses, is, Post 195.
That the Freehold, qua Freehold, is not the thing whereof there is an Occupancy; for the Freehold is not a natural thing, ^{but} *the. 4. v. Glebe* but hath its essence by the positive Municipal Law of the Kingdom; it cannot, abstract from the Land in this matter of Occupancy, be either entered into, or possessed. The Freehold is an immediate consequent of the Possession; for when a man hath gotten the Possession of Land that was void of a Proprietor, or other thing capable of Occupancy, the Law forthwith doth cast the Freehold upon the Possessor, to make a sufficient Tenant to the Precipe. Therefore,

As to the first Question, Whether Holden the Plaintiff's ~~En.~~ Quest. 1. try upon the Lessee Taverner's Possession, into the House, Glebe and Barn, the first of March, 1666. and openly saying, I enter and take possession of this House, Glebe and Barn, and the Ground thereto belonging, and the Tythes of Woolney, in my own Name and Right, as Occupant upon a Lease made to Giles Astry and his Assigns for three Lives, by Dr. Mallory Prebend of Woolney, did make him Occupant of the House, Land and Tythe, ~~or~~ either of them, the Lessee Taverner not having made any Claim as Occupant to any of them?

I hold clearly, this Entry and Claim did not make Holden Occupant of the House, Land, or Tythe, or of any of them.

To every Occupant of Land, or other thing capable of Occupancy, two things are requisite: 1. Possession of the Land, which was void and without Owner. 2. The having of the Freehold, to avoid an abeyance, which is had as well where the Possession is not void, as where it is.

The first, that is, the Possession, is acquired by the party, and is his Act; but the Freehold is acquired by the Act of Law, which calls it upon the Possession as soon as there is a Possessor, ~~or~~ where it finds a Possessor when the Freehold is in none.

1. This Claim and Entry was in order to gain the first Possession of the Land which was void; but that was impossible to be had, for the Lessee Taverner had the possession before he held it then, therefore the Claim was to no end.

Post 195. 2. Secondly, A man cannot be an Occupant but of a void Possession, or of a Possession which himself hath; but here was no void Possession when Holden enter'd and claimed as Occupant, for the Lessee was in lawful possession of the House and Barn and Land at the time of the Entry and Claim.

Ant. 189. 3. Thirdly, If this Entry and Claim should make Holden a legal Occupant, which cannot be without gaining the possession, then there would be two plenary legal Possessors of the same thing at the same time, Holden by his Entry and Claim, and Taverner the Lessee by virtue of his Lease: but that is impossible there should be two plenary Possessors of the same thing at the same time; therefore Holden can be no Occupant by such Entry and Claim.

Skelton and Hay, 17 Jac. Cr. 554. b. 4. This very Case in every point hath been resolved in the Case of Skelton and Hay, 17 Jac. where upon an Ejectment brought, a Special Verdict found, That the Bishop of Worcester made a Lease to Sir William Whorewood of certain Land for his own, and the lives of two of his Sons. Sir William did let the Land to John Mallett at will, rendering Rent, and died; Mallett continued the Possession, not claiming as Occupant; one of Sir William's Sons entred as Occupant, and made a Lease to the Plaintiff in the Action: It was adjudged, That Mallett the Defendant being in possession, the Law cast the Freehold upon him without Claim; and had he disclaim'd to hold as Occupant, keeping the Possession he must have been the Occupant; for where one entred to the Use of another, he that entred was adjudged the Occupant.

Chamberlyn and Eue's C. Roll part 2. £151. Lett.H. Post 195. 5. Which Case proves one may be an Occupant against and besides his own intention, and therefore a Claim to denote his intention.

Post 195. 5. To be an Occupant is not necessary, and Tenant for years, as well as at will, is Occupant by that Case. Besides, claiming to be Occupant, is to claim to be in possession, or to claim the Freehold, or both: but the Law binds not a man to claim that which he hath already; and therefore he that hath possession, and doth occupy the Land, is not to claim possession, or to be Occupant of it; no more is he to claim a Freehold which he already hath, for the Law hath cast it where it finds the possession; so having both possession and Freehold, the Law binds him not to claim what he hath.

Carter 61.

6. Claim

6. Claim is never to make a Right which a man hath not, but to preserve that which he hath from being lost: As, Claim to avoid a Descent, whereby a man had lost his Right to enter; so a man makes no Claim to be remitted, when by an act of Law he is in his Remitter.

As to the second Question, Whether Frances Astly, the Re. Quest. 2. left of Giles, entring the 25th of March, 1667. upon the Lessee Taverner's Possession, and claiming the House, Glebe and Tythe, as Occupant, and the Lessee Taverner attornning to her, makes her an Occupant of the House, Land or Tythe? The Question hath nothing in it differing from the former, but only the Attornment; and it is clear, the Attornment of Taverner the Lessee doth not disclaim his possession, but affirms it; for Attornment is the act of a Tenant by reason of his being in possession. Besides, admitting the Tenant a perfect Occupant, he might, continuing so, attorn to whom he pleased, as well as Astly might have done in his life-time, yet still continue the Estate that was in him.

It follows then that Taverner was the undoubted Occupant, after Astly's death, of the House, Land and Barn: But whether he had the Tythe of Woolney by such his Occupancy, wheretoof Astly died seized, is the difficult Question.

Another Question will arise, When Taverner the Lessee, who had by Lease the House, Barn and Land, and so found, and was Occupant certainly of those, when afterwards Taverner the Lessee, concessit & assignavit totum statum suum de & in pmissis, June 1667. to Holden the Plaintiff, and gave him Livery and Seisin thereupon, what shall be understood to pass by the word pmissis? If only what was leased and his Estate therein as Occupant, and likewise the Tythe, if the Tythe accrued to him by reason of being Occupant of the Land?

For if he were Occupant of the Tythe by Act in Law, by being Occupant of the Land, it follows not that if he pass all his Estate to Holden in the House and Land, and gave him Livery, that therefore he pass his Estate in the Tythe; nor is such passing found to be by Deed.

To clear the way then towards resolving the principal Question.

1. At the time of Giles Astly's death, the Tythes and the House and Lands were severed in Interest; for the Lessee Taverner had a Lease of the House, Glebe and Barn, and the Tythe continued in Astly.

2. This severance was equally the same, as if the Tythe had been demised to Taverner, and the House and Land had remained still in Astly's possession.

3. Cho' the Freehold of doth remained still in Astly at his death, notwithstanding the divided Interest in the Land and Tythe; yet the Freehold being a thing, quatenus Freehold, not capable in it self of Occupancy, nor no natural, but a legal thing, which the Law casts upon him that is Occupant, that will not concern the Questions, either Who was Occupant? or Of what he was Occupant?

Co.Lit.f.41.b.
Ant. 190.

Ibid.

Post 202.

Post 195.

4. I take it for clear, That a naked Tythe granted by it self *pur auer vie*, and the Grantee dying without Assignment, living *Cestuy que vie*, is not capable of Occupancy, more than a Rent, a Common in gross, an Advowson in gross, a Fair, or the like, are; it being a thing lying in Grant equally as those others do. Coke's Littleton; There can be no Occupant of any thing which lieth in Grant, and cannot pass without Deed. I cited the place at full before, with other Authorities, against Occupancy of a Rent.

5. If a man die seized of Land which he holds *pur auer vie*, and also dies seized of Rent held *pur auer vie*, or of an Advowson or Common in gross, held by distinct Grants *pur auer vie*, and the same *Cestuy que vie*, or the several *Cestuy vies* (for that will not differ the Case) living: Cho' the Grantee died seized of a Freehold in these several things, I conceive that he which enters into the Land first, after his death, will be Occupant of the Land which was capable of Occupancy; but neither of the Tythe, Advowson nor Common; which are not capable of Occupancy, and have no more coherence with, dependence upon, nor relation to the Land, than if they had been granted *pur auer vie* to another, who had happened to die in like manner as the Grantee did of the Land.

And

And that which hath intricated men in this matter, hath been a conception taken up, as if the Occupant had for his object in being Occupant, the Freehold which the Tenant died seized of; which is a mistake; for the Subject and Object of the Occupant are only such things which are capable of Occupancy, not things which are not, and not the Freehold at all, into which he neither doth, nor can enter; but the Law casts it immediately upon him that hath made himself Occupant of the Land or other real thing whereof he is Occupant, that there may be a Tenant to the Preceipe. But, as was well observed by my Brother Wilmott, No Preceipe lies for setting out Tythe at Common-Law. And I doubt not, by the Stat. of 32 H. 8. c. 7. tho' Sir Edw. Coke in his Litt. f. 159. a. seems to be of opinion, that a man may at Co. Lit. 159. a. his election have remedy for with-holding Tythe, after that Statute, by Action, or in the Ecclesiastical Court, by that Statute doubtless he hath for the Title of Tythe, as for Title of Land, or for the taking of them away, but not perhaps for setting them out.

6. When a severance therefore is once made of the Land and Tythe, it is as much severance of them, tho' the Tythe remain in Astly's possession, as if he had leased the Land to Taverner, and the Tythe to another; if then Taverner becoming Occupant of the Land, should have had nothing in the Tythe leased to another, as the Land was to him, no more shall he have the Tythe remaining in Astly himself at his death.

Still we must remember the ground insisted on, That no Occupancy begins with the Freehold, but begins by possessing the Land, or other real thing, which was void and ownerless; and that by Act of Law the Freehold is cast upon the Possessor, either entring where the possession was void, or being in pos. Ant. 192. session when Tenant pur auter vie died, either as Lessee for years, or at will to Tenant pur auter vie; for the Law equally casts the Freehold upon him, as was resolved in Chamberleyne and Eure's Case, Reported by Serjeant Rolls and others, Part 2. f. 151. Letter E. and in Castle and Dod's Case, 5 Jac. Cr. f. 200. Ibid.

Therefore after such severance made by the Tenant pur auter vie, the Land and Tythe are as distinct and surrendered from each other, as if Tenant pur auter vie had held them by distinct Grants, or leased them to distinct persons. Ant. 194

In the next place I shall agree,

Art. 190. That the Occupant of a House shall have the Estovers, or
way pertaining to such House, the Occupant of the Demesne of
a Manor, or of other Land, shall have the Advowson appendant,
or Villain regardant to the Manor or Common belonging to the
Land, and the Services of the Manor not severed from the De-
mesne before the Occupancy.

Ibid. For a Possessor of a House, Land, Demesne of a Manor, as Oc-
cupant, doth not by such his Possession sever any thing belong-
ing to the Land, House or Demesne, more than the Possessor by
any other Title than Occupancy doth; and if they be not se-
vered, it follows they must remain as before to the Possessor
of that to which they pertain.

Post 197. Of a Manor, being an entire thing, consisting of Demesnes
and Services, which are parts constituent of the Manor; the
possessing and occupancy of the Demesnes, which is one part,
can make no severance of the Services from the entire, and
therefore the Occupant hath all. And these things, tho' per-
haps there can be no Occupancy of them, being things that
lye in Grant, and pass not without Deed; yet when they are
Adjuncts, or pertaining to Land, they do pass by Livery only,
without Deed.

Co. Lit f. 121. & Sect. 183. Whatsoever passeth by Livery of Seisin, either in Deed or in
Law, may pass without Deed, and not only the Rent and Servi-
ces, parcel of the Manor, shall, with the Demesnes, as the more
principal and worthy, pass by Livery without Deed; but all things
regardant, appendant, or appurtenant to the Manor, as Incidents
or Adjuncts to the same, shall, together with the Manor, pass with-
out Deed, without saying *cum pertinentiis*. And if they pass by
Livery, which must be of the Land, they must likewise pass by
any lawful Entry made into the Land, and such the Entry of
the Occupant is.

But as by Occupancy of the Demesne Lands of a Manor,
the Services are not severed; so if they be severed at the time
when the Occupancy happens, that shall never of it self unite
them again.

Now in the Case before us, The Tythe is neither appendant
or appurtenant, or any sort of Adjunct to the Glebe or House;
nor are they to the Tythe; nor will a Lease and Livery of
the Glebe simply, with the Appurtenances, pass the Tythe at
all, nor a Grant of the Tythe pass the Glebe; nor are either
of

of them constituent parts of the Prebendary or Rectory, as the Services are of a Manor; for a total severance of the Services and Demesne destroy the Manor, but a severance of the Tythe or Glebe will not destroy the Rectory, more than the severance of a Manor, parcel of the Possessions of a Bishoprick, will destroy the Bishoprick; for the Glebe and the Tythe are but several Possessions belonging to the Rectory.

But it is true, that in the Case before us, and like Cases, a Grant of the Prebendary, or of the Rectory, *una cum terra Glebali, & Decimis de Woolney*, the Tythe, which alone cannot pass without Deed, doth pass by Livery of the Rectory; ^{Brownlow} and so pass, that tho' the Deed mentions the Tythe to be part 2. f. 201. Rowles and passed, yet if Livery be not given, which must be to pass the Mason's case, Land, the Tythe will not pass by the Deed, because the intention of the parties is not to pass them severally, but *una cum*, ^{11 Co. 48. 2.} and together.

Therefore the Tythe in such Case must pass in time by the Livery, which did not pass without it, tho' granted by the Deed.

Yet it is a Question, Whether in such Case the Tythe passeth by the Livery or by the Deed? For tho' the passing it by Deed is suspended by reason of the intention to pass the Land and Tythe together, and not severally, it follows not but that the Tythe passeth by the Deed where Livery is given, tho' not until Livery given.

If a man be seized of a Tenement of Land, and likewise of a Tythe, and agrees to sell them both, and without Deed gives Livery in the Tenement to the Bargainee, in name of it and of the Tythe, I conceive the Tythe doth not pass by that Livery.

But a Prebend or Church-man cannot now by the Statute of 13 Eliz. c. 10. 13 Eliz. cap. 10. make a Lease of the Possessions of his Prebendary without Deed.

A Prebendary or Rectory is in truth neither the Glebe, nor Tythe, nor both; for the one or the other may be recovered, and might at Common-Law have been aliened, the Rectory ^{Sid. 91.} remaining. But the Rectory is the Church Parochial, whereof the Incumbent taketh the Cure and Seisin by his Induction after his Institution, which is his Charge, and
D D without

without other Seisin than of the Ring or Key of the Church-door, by Induction into the Rectory the Parson is seized of all the Possessions belonging to his Rectory, of what kind soever.

But tho' by the name of the Rectory the Possessions belonging to it, of what nature soever, actually vest in the Incumbent upon Induction, and may pass from the Prebendary by Livery of the Prebend or Rectory to his Lessee, according to the parties intention,

Yet it follows not, That therefore an Occupant, who can be Occupant but of some natural and permanent thing as Land is, should, by being Occupant of that whereof Occupancy may be, have thereby some other thing heterogene to the nature of Land, and not capable of Occupancy, as a Tythe is, being neither appendant or appurtenant, or necessary part of that whereof he is Occupant; nor will it follow, that because by giving Seisin of the Rectory, the Tythe and Glebe belonging to it will pass, that therefore giving Livery of the Glebe will pass the Tythe. For it is observable, that if a man be Tenant in Tail of a Manor to which an Advowson is appendant, or of a Tenement to which a Common is belonging, and discontinue, the Issue in Tail shall never have the Advowson or Common, until he hath recontinued the Manor or Tenement.

But if a man be seized in Tail of a Rectory, consisting of Glebe and Tythe, and discontinue it; after the death of Tenant in Tail, the Heir in Tail shall have the Tythe which lay in grant, but must recover by Formedon the Rectory and Glebe. This was agreed in this Court in a Case between Christopher Baker and Searl in Ejectment, upon a Demise by the Earl of Bedford of the Rectory of D. & de Decimis inde pvenientibus for Lives of three other persons, and that Case seems to admit an Occupancy of the Tythe, the Question being concerning the Tythe only.

Cro. 37 El.
f. 407. p. 19.
Baker and
Searl's Case.

Quest. 3.

The next Question will be, That if Taverner, being Occupant of the House and Land, shall not have the Tythe whereof Astly was in possession at the time of his death, what shall become of this Tythe during the lives of the Cestuy que vies? which is the hard Question.

And

And as to this Question :

If a Rent be granted to A. for the life of B and A dies, Carter 48.
leaving B. I conceive this Rent to be determined upon the
death of A. equally, as it granted to him for his own life.
I say, determined, because it is not properly extinguished, nor
is it suspended.

For Extinguishment of a Rent is properly when the Rent is
absolutely conveyed to him who hath the Land out of which the
Rent issues, or the Land is conveyed to him to whom the
Rent is granted.

And Suspension of a Rent is when either the Rent or Land are
so conveyed, not absolutely and finally, but for a certain time
after which the Rent will be again revived.

The Reasons why it is determined are, Because a thing so
granted, as none can take by the Grant, is a void Grant, that is,
as if no such Grant had been. Therefore a Grant to the Bi-
shop of L. and his Successors, when there is no Bishop in be-
ing at the time, or to the Dean and Chapter of Pauls, or to the
Mayor and Commonalty of such a place, when there is no
Dean or Mayor living at the time of the Grant, is a void
Grant, that is, as if it had not been, tho' such a Grant by
way of Remainder may be good. By the same Reason it
follows, That when any thing is so granted, that upon some
Contingent happening, none can take by the Grant, nor pos-
sibly have the thing granted, both the Grant and Thing gran-
ted must necessarily determine : For what difference is there
between saying that Rent can no longer be had, when it is de-
termined by his Death for whose Life it was granted, and saying
none can longer have this Rent when it determines by the death
of the Grantee *par autre vie*? For there is no Assignee, Occu-
pant, or any other, can possibly have it ; and it is therefore
determined.

In an Action of Trover and Conversion brought by Salter Salter versus
against Boteler, the Defendant justifies for that one Robert Boteler.
Bash was seized in Fee of twenty Acres in Stansted, and grant-
ted a Rent-charge to another Robert Bash, his Executors and
Assigns, during the life of Frances the Grantees Wife, of
Sixteen Pounds per Annum. The Grantee dies, and Frances
his Wife takes Letters of Administration, and the Defendant,
as her Servant, and by her Command, took a Distress in the
said twenty Acres for Rent-arrear, and impounded them ;

And traverseth the Conversion and taking in other manner.

Upon Demurrer to this Plea, all the Court held the Plea to be bad, and gave Judgment for the Plaintiff.

1. Because the Rent was determined by the death of the Grantee, because no Occupant could be of it.

2. Because the Feme was no Assignee by her taking of Administration.

3. None can make Title to a Rent to have it against the Terr-tenant, unless he be party to the Deed, or make sufficient Title under it.

Moore 664. The same Case is in Moore, reported to be so adjudged, p. 907. Salter because the Rent was determined by the death of the Grantee; vers. Boteler. and Popham said, That if a Rent be granted *pur auter vie*, the Carter 48. Remainder over to another, and the Grantee dies, living Cestuy *que vie*, the Remainder shall commence forthwith, because the Rent for Life determined by the death of the Grantee. Which last Case is good Law; for the particular Estate in the Rent must determine when none could have it; and when the particular Estate was determined, the Remainder took place.

Co. Lit. H. 6. And as the Law is of a Rent, so must it be of any thing which lies in Grant, as a several Cythe doth, whereof there can be no Occupant, when it is granted pur auter vie, and the Grantee dies in the life of Cestuy que vie.

20 H. 6. f. 7, 8. This is further cleared by a Case in 20 H. 6. A man purchased of an Abbot certain Land in Fee-farm, rendering to the Abbot and his Successors Twenty pounds yearly Rent: If all the Monks die, this Rent determined, because there is none that can have it: It lies not in Tenure, and therefore cannot Escheat; and tho' new Monks may be made, it must be by a new Creation wholly.

In vacancy of This Case agrees exactly with the Grant of a Rent or other a Parson or Vicar, the thing which lies in Grant, pur auter vie, the Grantee dying, Ordinary *ex officio* shall the Rent determines, tho' it were a good Grant, and enjoyed cice to pay at first, yet when after none can have it, it is determined. Tythes, Fitz. So was the Rent to the Abbot and his Successors a good Rent, N. Br. Con- and well enjoyed. But when after all the Covent died, so as fulation, Let G. none could have the Rent, for the Body Politick was destroyed, the Rent determined absolutely.

Ant. 194.

2. If any man die seized of Land pur ayter vie, as also of many of these things in gross pur auter vie, by distinct Grant from the Land, the Occupant of the Land shall have none of these things, but they are in the same state, and the Grants determine as if the Grantee had died seized of nothing whereof there could be any Occupancy.

2 Saund.

But I must remember you, that in this last part of my Discourse where I said, That if a Rent, a Tythe, a Common, or Advowson in gross, or the like, lying in Grant, were granted *pur auter vie*, and the Grantee died, living *Cestuy que vie*, that these Grants were determined: my meaning was; and is, where such Rent, Tythe, or other things, are singly granted, and not where they are granted together with Land, or any other thing out of which Rent may issue, with Reservation of a Rent out of the whole.

2 Saund. 303.

304. Co. Linc. f. 142.

2. 144. 2.

For altho' a Rent cannot issue out of things which lie in Grant, as not distrainable in their nature, yet being granted together with Land, with reservation of a Rent, tho' the Rent issue properly and only out of the Land, and not out of those things lying in Grant, as appears by Littleton; yet those are part of the Consideration for payment of the Rent, as well as the Land is.

In such Case, when the Rent remains still payable by the Occupant, it is unreasonable that the Grant should determine as to the Tythe, or as to any other thing lying in Grant, which passed with the Land, as part of the Consideration for which the Rent was payable, and remain to the Lessor as before they were granted; for so the Lessor gives a Consideration for paying a Rent which he enjoys, and hath notwithstanding the Consideration given back again.

And this is the present Case, being script and singled from such things as intricate it: That Doctor Mallory, Prebend of the Prebendary of Woolney, consisting of Glebe-land, a House, Barns, and Tythe of Woolney, and thereof seized in the Right of his Prebendary, makes a Lease to Astly of the Prebend', una cum the Glebe, House, Barn, and Tythe, for three Lives, rendering the accustomed and ancient Rent of Five pounds twelve shillings; Astly demiseth to Taverner

verner the House, Glebe and Barn for a year, reserving Twenty shillings, and dies, the Cestuy que vies living.

As I concluded before, Taverner is Occupant of the House, Barn and Glebe-land, and consequently liable to pay the whole Rent, being Five pounds twelve shillings yearly, tho' the Land, House and Barn be found of the yearly value of Twenty shillings only: but because the Rent cannot issue out of Tythes, or ^{Ant. 202.} things that lie in Grant, it issues only out of the House, Barn and Land, which may be distrained on.

2. If Taverner, being Occupant of the Land, shall not have the Tythes which remained in Astly, according to his Lease for three Lives at the time of his death, and whereof by their nature there can be no direct Occupancy: it follows, that the Lease made by Dr. Mallory is determined as to the Tythe, for no other can have them; yet continues in force as to the Land and House, and all the Rent reserved; which seems strange, the Land and Tythe being granted by the same Demise for three Lives, which still continue: yet the Lease to be determined as to part.

3. Tho' the Rent issue not out of the Tythe, yet the Tythe was as well a Consideration for the payment of the Rent, as the Land and Houses were; and it seems unreasonable that the Lessor, Dr. Mallory, should by Act in Law have back the greatest Consideration granted for payment of the Rent, which is the Tythe, and yet have the Rent wholly out of the Land by Act in Law too, which cannot yield it.

4. Tho' Dr. Mallory could not have reserved a Rent out Co. Lit. 47. a. of the Tythe only, to bind his Successor upon a Lease for Lives, more than out of a Fair, tho' it were as the ancient Rent, and had been usually answered for the Fair; as is resolved in Jewell Bishop of Sarum's Case: Yet in this Case, ^{Jewell's Case, Rep.} where the Tythe, together with Land, out of which Rent, the Successor could never avoid the Lease, either in the whole, or as to the Tythe only.

This

13 Eliz. c. 10. This seems clear by the Statute of 13 Eliz. cap. 10. which saith, All Leases made by any Spiritual or Ecclesiastical persons, having any Lands, Tenements, Tythes or Hereditaments, parcel of the Possessions of any Spiritual Promotion, other than for One and twenty years, or three Lives, whereupon the accustomed yearly Rent, or more, shall be reserved, shall be void.

Co. Lit f. 142.
2. f. 144. 2. Whence it is apparent, this Statute intended that Leases in some sense might be made of Tythes for One and twenty years, or Three Lives, and an ancient Rent reserved; but of a bare Tythe only a Rent could not be reserved, according to Jewell's Case; for neither Distress nor Assize can be of such Rent, though an Assize may be de Portione Decimorum, as is clear by the Lord Dyer, 7 E. 6. and the difference rightly stated.

Therefore a Lease of Tythe and Land, out of which a Rent may issue, and the accustomed Rent may be reserved, must be good within the intention of the Statute, or Tythe could in no sense be demised.

Ant. 190. 5. Taverner the Lessee being Occupant here by his possession becomes subject to the payment of the Rent, to Waste, to Forfeiture, Conditions, and all things that Astly the Lessee, or his Assignee, if he had made any, had been subject to: Also,

Co. Lit. 41. He must claim by a Que Estate from Astly, he must aver the Life of Cestuy que vie, so as he becomes, to all intents, an Assignee in Law of the first Lessee.

6. Without question, the Occupant being chargeable with the Rent, shall by Equity have the Tythe, which was the principal Consideration for payment of the Rent, when no man can have the benefit of the Tythe but the Lessor, Dr. Mallory, who gave it as a Consideration for the Rent, which he must still have. Therefore

I conceive the Reason of Law here ought necessarily to follow the Reason of Equity; and that the Occupant shall have the Tythe, not as being immediate Occupant of the Tythe, whereof no Occupancy can be; but when by his possession of the Land he becomes Occupant, and the Law casts the Freehold upon him, he likewise thereby becomes an Assignee in Law of Astly's Lease and Interest, and consequently of the Tythe.

An ancient Rent reserved within the Stat. of 102 13 of the Queen upon a Lease of One and twenty years, or three Lives, is by express intention of that Statute a Rent for publick Use and Maintenance of Hospitality by Church-men, as is resolved in Elsemere's Case, Rep. 5. and therefore if the Lessee provide Elsemere's C. not an Assignee to answer the Rent to the Successors of the ⁵ Rep. Lessor for the ends of that Law, the Law will do it for him, and none fitter to be so than the Occupant, in case of a Lease pur autre vie, as this is.

And if the Occupant, being Assignee, hath passed all his Estate and Interest to the Plaintiff, the Plaintiff hath good cause of Action for the Tythe converted by the Defendant.

Pasch. 22 Car. 2. Judgment for the Defendant. Three Justices against the Chief-Justice.

Trin. 20 Car. 2. C. B. Rot. 2043.

2 Ventris 9.

Harrison versus Doctor Burwell.

In a Prohibition for his Marriage with Jane, the Relict of
Bartholomew Abbot, his Great Uncle.Haley v Burwell
22d. Ell. 289.

The Questions are,

Quest. 1.

Wether the Marriage of *Thomas Harrison* the Plaintiff with *Jane* his now Wife, being the Relict of *Bartholomew Abbot* his Great Uncle, that is, his Grandfather's Brother by the Mothers side, be a lawful Marriage within the Act of 32 H. 8. cap. 38?

Quest. 2.

Post 208.

Admitting it to be a lawful Marriage within the meaning of that Act, Whether the King's Temporal Courts are properly Judges of it, because the unlawfulness or lawfulness of it, by that Act, doth depend upon its being a Marriage within or without the *Levitical Degrees*? For if within those Degrees, it is not a lawful Marriage by that Act; and the right knowledge of Marriages within or without those Degrees, must arise from the right knowledge of the Scriptures, of the *Old Testament* specially, the Interpretation of which hath been, and regularly is, of Ecclesiastick Conusance, and not of Lay or Temporal Conusance, in regard of the Language wherein it was writ, and the received Interpretations concerning it in all Succession of Time.

Quest. 3.

Admitting the King's Temporal Courts have by that Act of 32. or any other, special Conusance of the *Levitical Degrees*, and of Marriages within them: and tho' this be no Marriage within the *Levitical Degrees*, (it being articled in general to be an *Incestuous Marriage*.) Whether the Temporal Courts of the King can take Conusance in general, that it is not an Incestuous Marriage, by the Act of 32 H. 8. and consequently prohibit the questioning of it in the Ecclesiastical Courts? because the words of that Act are, **That no Marriage shall be impeached (God's Law except) without the Levitical Degrees**, and therefore within

Ant. 206.

Notwithstanding it will be said, They want knowledge or skill in the Law by which it must be determined what are, or are not, the Levitical Degrees; for they are not studied in that Divine Law, they want skill in the Original in which it was written, and in the History by which it is to be interpreted.

As specious as this seems, it is a very empty Objection; for no man is supposed necessarily ignorant of a Law which he is bound to observe. It is irrational to suppose men necessarily ignorant of those Laws for breach of which they are to be punished, and therefore no Canon of Divine or Human Law ought to be supposed unknown to them who must be punished for transgressing them. We are obliged not to marry in the prohibited Degrees, not to be Heretical, or the like: therefore we are supposed to know both.

2 Ven. 21.

Now is it an Exception to disable a man of having any Church Dignity whatever, that he is not knowing in the Hebrew or Greek Tongue. All States receive the Scriptures in that Language wherein the several States think fit to publish them for common use; and it is but very lately that the Christian Churches have become knowing in the Original Tongues wherein the Scriptures were written, which is not a Knowledge of Obligation, and required in all, or any, but a Knowledge accidental, and enjoyed by some.

Post 213, 304.

If it were enacted by Parliament, That matters of Inheritance, of Theft and Murder, should be determined in the Courts of Westminster according to the Law of Moses, this Objection would not stand in the way, no more can it in this particular concerning Incestuous Marriages.

The Laws of one People have frequently been transferred over and become the Laws of another; as those of the Twelve Tables from Greece to Rome; in like manner those Laws of the Rhodians for Maritime Affairs made the Law of the Romans; the Laws of England into Ireland; and many such might be instanced.

As another Limb of this Objection, it is said, This A& 32 H. 8. seems rather a directing Act how the Courts Ecclesiastical should proceed touching Marriages out of the Levitical Degrees, than an Act empowering the Temporal Courts to prohibit their Proceeding.

Post 304.

When the King's Laws prohibit any thing to be done, there are regular ways to punish the Offender; as, for common Offences, by Indictment or Information; Erroneous Judgments are remedied by

5. This Marriage not prohibited by the Canons, 1 Jac. Can. 99. nor contained in the Parochial Table.

6. Marriages between the Children and Parents in the ascending Line intermediately prohibited; and for what Reasons.

7. How the words (God's Law except) in the Act of 32 H. 8. and the words (or otherwise by Holy Scripture) in the Act of 28 H. 8. cap. 16. are to be intended.

8. The Defendant doth not article, That the Uncle, Bartholomew Abbot, did carnally know Jane his Wife, and then the Marriage is not against God's Law by 28 H. 8. c. 7..

The mischief by the Act of 32 H. 8. was, That the Bishop of Rome had always troubled the meer Jurisdiction and Regal Power of the Realm of England, and unquieted the Subject by making that unlawful, which by God's Word is lawful, both in Marriages and other things.

Therefore it is thought convenient for this time, that two things be with diligence provided for.

The first was against dissolution of Marriages consummate with bodily knowledge, upon pretence of Pre-Contracts.

The other by reason of other Prohibitions to marry than God's Law admitteth, as in Kindred or Affinity between Cousin-Germans, and so to the fourth and fifth Degree, which else were lawful, and be not prohibited by God's Law. — Again, that freedom in them was given by God's Law.

To remedy these two mischiefs, All Marriages consummate with bodily knowledge between lawful persons, and all persons are declared to be lawful to marry which be not prohibited by God's Law, are made lawful by Authority of Parliament, notwithstanding any Pre-Contract, &c.

But this part of the Clause to make good Marriages notwithstanding Pre-Contracts, is repealed, 2 E. 6. c. 23. 1 El. c. 1.

The other Clause remains, which declares all persons lawful to marry who are not prohibited by God's Law, but is of no use to remedy the second mischief.

For if the Pope shall expound what persons of Consanguinity or Affinity are prohibited by God's Law to marry, he will expound God's Law as the Canons and Popes formerly did.

That by the Word of God no man is to uncover the nakedness of the Kindred of his flesh, and therefore Marriage is prohibited as far as there are Names of Kindred, and memory, which is the reason of the Old Canon-Law to prohibit to the seventh Degree, for further they had not Names of Kindred. And if it would have remedied the inconvenience, to say in the Act, That all

Mar-

2. The Pope would have interpreted the Scripture (which belonged to him) to have prohibited all Marriages between Kindred, as anciently, and then the end of the Act had been frustrate.

3. Wherein was the King's Jurisdiction and Regal Power righted, if prohibiting of Marriage for Consanguinity or Affinity, were to be proceeded in as formerly?

But all Marriages without the Levitical Degrees being made lawful, because the Secular Judges by the Act of 28 H. 8. c. 7. had certain Conusance of them both expreſſly, and in conſe-quence they were no more of Ecclesiastical Conusance than Contrads concerning Land or Lay-Chattels were, and there-fore the questioning of them to be prohibited as the other.

This was to complain of the Pope as a Wrong-doer against the Law of God, viz. Holy Scripture, and diligently to provide remedy for it according to the Scripture, whereof the Wrong-doer was the only decisive and infallible Interpreter, as the Church then believed; which is redressing a Wrong by the Judgment of the Wrong-doer.

Anciently, before any Act of Parliament alter'd the Law, the lawfulness or unlawfulness of Marriages, and which were Inceſtuous which not, were only of Ecclesiastical Conusance, and the Temporal Courts meddled not to ratifie or prohibit any Marriage.

The Statute *de circumſpecte Agatis.*

13 E. I.

Circumſpecte Agatis de Negotiis tangentibus Episcopum Nor-wic' & ejus Clerum non puniendo eos, si placitum tenuerint in Curia Christianitatis de his quæ mere sunt spiritualia, viz. de Correctionibus quas faciant pro mortali peccato, viz. pro Forni-catione, Adulterio, & hujusmodi.

Mag. Chart.
Cok. f. 488.
upon that
Statute.

Hob. 195.

Sir Edw. Coke in his Comment upon this Statute, and those words, viz. pro Fornicatione, Adulterio, & hujusmodi, which by the expreſſ words of the Statute are ſaid to be mere spiritualia, ſaith, and truly, That the word *hujusmodi* must be understood of Offences of like nature with Fornication and Adultery; as, for follicitation of a Womans Chastity, which is leſs than Fornication or Adultery; and for Inceſt, which is greater. So as the Conuance of Inceſt was merely ſpiritual, and concerned not the Lay-Law, at all originally.

2. There

that is, by the Divine Law; And such an Act of Parliament was directory only to the Proceeding of the Spiritual Judges in Causes of Matrimony, and no way advancing the Jurisdiction of the Temporal Courts, nor enabling them to prohibit the questioning of any Marriage.

The Law and Reason of it being thus stated before the
 25 H. 8. c. 22. Acts of Parliament of 25 H. 8. c. 22. 28 H. 8. c. 7. 28 H. 8.
 28 H. 8. c. 7. c. 16. 32 H. 8. c. 38. We will see what alteration was
 28 H. 8. c. 16. induced by these respective Statutes in order.
 32 H. 8. c. 38.

And first the Act of 25 H. 8. hath these words— Since many inconveniences have fallen, as well within this Realm as in others, by reason of marrying within the Degrees prohibited by God's Law,

(That is to say)

The Son to marry the Mother.
 The Son to marry the Stepmother.
 The Brother to marry the Sister.
 The Father to marry his Son's Daughter.
 The Father to marry his Daughter's Daughter.
 The Son to marry his Father's Daughter procreated and born by his Stepmother.
 The Son to marry his Aunt, his Father's Sister or Mother's Sister.
 The Son to marry his Uncle's Wife.
 The Father to marry his Son's Wife.
 The Brother to marry his Brother's Wife.
 A Man to marry his Wife's Daughter.
 His Wife's Son's Daughter.
 His Wife's Daughter's Daughter.
 His Wife's Sister.

Which Degrees, i. are the Degrees expressly mentioned in the 18th Chapter of Leviticus, and were for Matter and Language by this Act first made of Lay Conusance.

Selden Mare
Clauis 8.
Still. Eccles.
Com. 33.

It declares those Marriages to be plainly prohibited by God's Law, that notwithstanding they have sometimes proceeded by colour of Dispensation by Man's Power, which ought not to be: For no Man can dispense with God's Law, as the Clergy in the Convocation, and most of the famous Universities of Christendom, have affirmed, &c..

Then

Then it enacts a Separation by definitive Sentence in the Spiritual Courts of the Kingdom, without Prohibition from or Appeal to Rome of such Marriages:

The next Act of Parliament concerning Marriages prohibited, 28 H. 8. c. 7. is, 28 H. 8. c. 7.

By which Act the former Act of 25. is repealed, not for the matter of the Marriages there prohibited, as is said in that Act; and therefore

In the same words, The Marriages within those Degrees are recited again, and prohibited by God's Law.

But with these differences, That in the Prohibition,

1. Of the Sons marrying the Stepmother, is added, Carnally known by his Father.

2. In the Prohibition of marrying his Uncle's Wife, is added, Carnally known by his Uncle.

3. In the Prohibition of the Father to marry his Son's Wife, is added, Carnally known by his Son.

4. In that of the Brother to marry his Brother's Wife, is added, Carnally known by his Brother.

5. In those of marrying a Man's Wife's Daughter, or her Son's So Sir Edw. Daughter, or her Daughter's Daughter, is added, Having the ^{Coke refers} the Levitical Degrees to this Act, second time made of Lay Conuance.

Another alteration in this Act from the former is, That if any Man carnally know any Woman, all persons in any Degree of Consanguinity or Affinity of the parties so offending shall be adjudged to be within the said Prohibitions, in like manner as if the parties so carnally knowing one another had been married. For Example: If a Man carnally know a Woman, not marrying her, he is prohibited to marry her Daughter, or Daughter's Daughter, & c converso.

In all other Clauses this Act and the former of 25. are verbatim the same, and this Act is in force.

Observations upon those two Acts 25 & 28 H. 8.

1. That by neither of these Acts no Marriage prohibited before, either by God's Law or the Canon-Law, differenced from it, is made lawful.
2. That the Marriages particularly declared by the Acts to be against God's Law, cannot be dispensed with; but other Marriages, not by the Acts declared in particular to be against God's Law, are left *statu quo prius*, as to Dispensations with them.
3. That neither of these Acts gave any Jurisdiction to the Temporal Courts concerning Marriages, more than they had before, but were Acts directory only to the Ecclesiastick Proceeding in matters of Marriage.
4. Neither of these Acts say or declare, That the Degrees rehearsed in the said Acts, and thereby declared to be prohibited by God's Law, are all the Degrees of Marriage prohibited by God's Law.

For take the words at most advantage for that purpose, viz. Since many inconveniences have fallen by marrying within the Degrees prohibited by God's Law; That is to say, The Son to marry the Mother, the Brother the Sister, &c. And that the enumeration in the Act of prohibited Degrees had gone no farther than to the Degrees of Consanguinity, not enumerating any Degrees of Affinity:

As then it had been no Inference to conclude that there were no more prohibited Degrees by God's Law intended by the Statute, than the Degrees of Consanguinity only;

So now no Degrees being mentioned in the Statute to be prohibited by God's Law but those which are expressed, it cannot thence be concluded that the Statute intended no other than those to be prohibited by God's Law.

For those are therefore mentioned to be prohibited, because they were Degrees signally expressed, and concerning which no Question or Doubt could be made.

Yet the Tryal was, Whether the Marriage was prohibited by Holy Scripture? Which being only of Ecclesiastick Conuance, they only could judge of the lawfulness.

And that the Temporal Courts could by that Act no more judge what Marriage was Lawful or Incestuous by the Holy Scripture, than what was Schism or Heresie by the Holy Scripture.

3. By this Act it is evident the Law-makers thought some Marriages were or might be prohibited by God's Law, not limited in the Act of 28 H. 8.

So if the Act had limited all Marriages lawful, but those forbidden in the Five Books of Moses, or in the Book of Moses called Leviticus, tho' the unlawfulness of Marriage had been more restrained under that expression, than under the general expression of Holy Scripture, yet

Those Books being part of Holy Scripture, the Secular Judges had no more Conuance of the Parts than of the Whole.

And so would it have been if the Act had restrained the unlawfulness of Marriage to the 18th Chapter of Leviticus, that being a part of the Book called Leviticus, the Temporal Courts could have no more Conuance of that part or Chapter of the Book, than of the whole Book. This I think is the full of the Objection.

32 H. 8. c. 28.

The last Law, and which is Cardo Questionis, as being pleaded by the Plaintiff Harrison in the Books, is the Act of 32 H. 8. cap. 38. consisting of several parts, some whereof are repealed, as the Branch concerning Pre-Contracts.

I shall therefore examine that Act as it stands in force.

1. Marriages between Cousin-Germans, and all Marriages onwards between Collateral Cousins, which were prohibited very far before the Council of Lateran, and since it, those to the Fourth Degree, to the making of this Act, are made lawful, and declared not to be against the Law of God, viz. in these words,—And be not prohibited by God's Law.

6. Re-

2. Restraining of Marriage by reason of Carnal Knowledge within any of those Degrees, is expressly taken away, and the Marriages declared not to be against the Law of God. In these, Sir Edward Coke in his Comment upon this Statute in his Magna Charta, is express. Cok. Magna Chart. f. 6.84

So if any Marriage within those Degrees shall be questioned as Incestuous in the Spiritual Courts, a Prohibition will lie upon this Act, because the Marriages, by one part of the Act, are declared expressly,

1. Not to be against the Law of God.

2. By another, All Marriages contracted between lawful persons, (as we declare all persons to be lawful that are not prohibited by God's Law to marry) are lawful.

Joining then those two Clauses together, That all Marriages are lawful, not prohibited by the Law of God; And, That such Marriages of Cousin-Germans, and so onwards, are not prohibited by God's Law: It is manifest that Prohibitions will lie in such Cases.

But these Marriages concern not the Case in question.

The next Clause in the Act, and upon which the present Case stands,

That no Reservation or Prohibition (God's Law except) shall trouble or impeach any Marriage without the *Levitical Degrees*.

The clear sense of which Clause must be, That all Marriages are lawful, which are not prohibited within the *Levitical Degrees*, or otherwise by God's Law.

So as the prohibiting of Marriages within the Levitical Degrees, and within God's Law, whereof the Levitical Degrees are a part, is no more or less in effect than to say, All Marriages shall be lawful that God's Law doth not prohibit.

Whence it is collected, That of God's Law in general, or of the Levitical Degrees in particular, being a part of that Law, the Temporal Judges had no Consulane after this Act more than before; and that this Act, excepting in the matter of Marriages to the Fourth Degree and onwards, which it declares not to be against God's Law, was only directory to the Ecclesiastick Courts, as the former Statutes were, and gave the Temporal Courts no Jurisdiction to prohibit questioning any Marriage but those of Cousin-Germans and onwards.

^{2 Ven. 15. to}
^{22.}
^{Post 304.} But the Judges of the Temporal Courts have long since, and often after the Act of 32 H. 8. granted Prohibitions for questioning Marriages out of the Levitical Degrees, and thereby determined the lawfulness of such Prohibitions.

^{Ibid.} So as many Parliaments having passed since Prohibitions granted in that kind, without complaint of it, as is likely, but certainly without redress for it; It is not safe, in a Case of Publick Law, as this is, between the Spiritual and Temporal Jurisdiction, to change the received Law, nor do I think it is expedient.

That being taken then as settled, That the Spiritual Courts may be prohibited to question Marriages out of the Levitical Degrees,

The first Question will be,

Whether any Marriages be against God's Law, but those within the Levitical Degrees? For if none else be, the Temporal Courts having Conusance of Marriages within those Degrees, have consequently Conusance of all Marriages against God's Law. Then must the words of the Statute,

No Marriage shall be impeached (God's Law excepted) without the Levitical Degrees, be understood thus:

No Marriage shall be impeached (God's Law excepted) viz. his Law of the Levitical Degrees.

^{Co. Litt. f.}
^{235. a.} The Authority which makes for this Exposition, is Coke in his Littleton, where these words are;

For by the Statute of 32 H. 8. cap. 38. it is declared, That all persons be lawful (that is, may lawfully marry) that be not prohibited by God's Law to marry; that is to say, that be not prohibited by the Levitical Degrees.

By which evidently he makes all the Law of God which prohibits Marriages, to be only the Levitical Degrees.

But I conceive clearly, There are other Laws of God prohibiting Marriages to be made; and if made warranting their Dissolution; and so intended to be by this Statute of 32 H. 8. besides the Law of God in the Levitical Degrees,

1. For persons pre-contracted to another, are prohibited by God's Law to marry against such Pre-Contract.

2. Persons of natural Impotency for Generation are pro. Ant. 211.
hibited to marry: For Marriage being to avoid Fornication, Calvin. Epist.
if it be useless for that purpose, as natural Impotency is, it is 1 Cor 7. v. 1.
as null.

So is the Case of Sabell, and another Case of one Bury, D^r. Dy. 2 El. 178.
divorced at the Suit of their Wives for Impotency.

3. Plurality of Wives or Husbands is prohibited by God's Law,
the first being not prohibited by the Levitical Degrees.

And Sir Edw. Coke, in the end of his Comment upon this Cok Mag. Ch.
Statute, notwithstanding the passage before in his Littleton, f. 687. a.
faith expressly, That Marriages made with a person pre-contracted,
or with an impotent person, could not have been questioned in
order to a Divorce by reason of this Statute, but because such
Marriages are against God's Law; yet are they all without the
Levitical Degrees. This is the reason of the words, God's Law
except, for these Marriages may be impeached, tho' out of
the Levitical Degrees; this answers the words, Or otherwise by
Holy Scripture, in 23 H. 8. c. 16. also.

In what sense any Marriages and Copulations of Man
with Woman, may be said to be Natural, and in
what not.

In the first place, to speak strictly what is unnatural, it is
evident that nothing which actually is, can be said to be un-
natural; for Nature is but the production of effects from causes
sufficient to produce them; and whatever is, had a sufficient
cause to make it be, else it had never been; and whatsoever is
effected by a cause sufficient to effect it, is as natural as any
other thing effected by its sufficient cause. And in this sense
nothing is unnatural but that which cannot be, and conse-
quently nothing that is, is unnatural; and so no Copulation of
any Man with any Woman, nor an effect of that Copulation by
Generation, can be said unnatural; for if it were, it could not
be; and if it be, it had sufficient cause.

There are other Males and Females differing in their Spe-
cies, which never have Appetite of Generation to each other,
and consequently can never have the effect of that Appetite,
the kinds whereof are innumerable.

Between these the Acts of Generation are so unnatural, that they are impossible, and no restraint is necessary to such by Laws, or by other Industry.

Marriages forbidden in *Leviticus* lawful before.

Those Marriages and Carnal Knowledge which are amongst the most Incestuous enumerated in *Leviticus* the 18th, were so far from being unnatural in primordiis rerum, that they were not only natural, but necessary, and commanded in that Command of Increase and multiply; that is, the Carnal Knowledge between Brothers and Sisters.

For the World could not have been peopled but by Adam's Sons going in to their Sisters, being Brothers and Sisters by the same Father and Mother, or by a more Incestuous Coupling than that; and if such Carnal Knowledge had been absolutely unnatural in any sense, it had never been either lawful or necessary; for, whatsoever is simply and strictly unnatural at any time, was always unnatural, and unchangeable.

Marriages lawful after restoring the World in *Noah*.

Post 237.

After the Peopling of the World, first from Adam, then from Noah, and to the time of Moses giving the Levitical Law, many other Marriages prohibited in the Levitical Degrees were not only lawful, but prosecuted with the most signal Benedictions and Promises of God:

Gen. 20. v. 12.

As the Marriage of Abraham with Sarah, who was his Sister, that is, the Daughter of his Father, but not the Daughter of his Mother.

So is his Answer to Abimilech, and so is the Tradition of her Genealogy,

But by the 18th of *Leviticus* the Marriage of the Sister by the Father's side is prohibited to the Son, viz.

Lev. 18. v. 9.

Thou shalt not discover the shame of thy Sister, the Daughter of thy Father, or the Daughter of thy Mother, whether she be born at home, or born without, &c.

The next instance is of Amram, the Father of Moses and Aaron, who married Jochobed his Father's Sister, namely, the Sister of Koath.

And

And *Amram* took *Jocbebed* his father's sister to his wife, and *Exod. 6. v. 20.*
she bare him *Aaron* and *Moses*.

Which Marriage is prohibited in the 18th of Leviticus viz. *Lev. 18. v. 12.*
Thou shall not uncover the shame of thy father's sister, for she is
thy father's kinswoman.

Jacob had two Wives at the same time, *Lea* and *Rachel*, *Gen. c. 29, &c.*
being Sisters; which is a known Story.

But by the 18th of Leviticus, — Thou shalt not take a wife *Lev. 18. v. 18.*
with her sister during her life, to vex her in uncovering her shame
upon her.

Before the Prohibitions in the 18th of Leviticus, and then,
and after, a man not only might, but ought, in some cases,
to marry his Brother's Wife, that was, if his Brother died
Childless, as appears in the History of *Thamar* and *Judah* be-
fore the Levitical Law.

Then *Judah* said to *Onan*, Go in to thy brother's wife, and do the *Gen. 18. v. 8. 9.*
office of a kinsman unto her, and raise up seed unto thy brother.

Onan would not (after a strange manner) wherefore the *Lev. 18. v. 16.*
Lord slew him.

But in the 18th of Leviticus it is said, Thou shalt not discover *Deut. 25. v. 5.*
the shame of thy brother's wife, for it is thy brother's shame.

The sequel of that History is well known; and these instan-
ces fully prove, that those several Marriages before instanced,
and which are prohibited in the 18th of Leviticus, were law-
ful before, and practised by the most remarkable men for Ho-
liness of life.

Nachor, the brother of *Abram*, married *Milcah*, his brother
Haran's Daughter; so the Uncle married the Niece, *Gen. c. 11.*
v. 29, 30.

To this may be added, That Children from Nature know not
their Parents or Kindred from other people, and therefore their
Acts, whatever they be, whether of Marriage or otherwise, are
(regarding nature only) as indifferent towards their Parents
and Kindred, as towards any other Men or Women.

The Parents may possibly know their Children, and more
especially the Mother, by a knowledge that is natural; but
it is impossible the Children should naturally know their Pa-
rents: Therefore they cannot naturally know that they do
transgress towards their Parents.

But the knowledge of our Parents is subsequent to Nature,
and not coequal with her, and ariseth from Civil Laws, Educa-
tion, and common Reputation, not from Nature; we take those
for our Parents whom the Laws denote to be so.

The Theban Story of Oedipus and Jocasta his Mother is an obvious Example in this kind, where both ignorantly married each other, and had Issue between them. Of the Marriage Naturali & gentium juxta Disciplinae Ebraeor. Vide. I. 5. c. 11.

Besides, what is unnatural to Man, qua Man, must be so to all Men, and at all times: but what is unnatural to this or that individual Man, is unnatural only to him, and only for the time it is so, and not to other Men,

How things become Unnatural by Custom.

A second way by which Mens Acts are said to be unnatural (and are so in some measure) is, When Laws Divine or Human do supervene upon Man's Original Nature, with great Penalty for transgressing them. Mens Education, *a teneris annis*, to observe those Laws, the Infamy attending their violation, and the religious customary observance of them, implant a horror and averseness to break them; so that by long custom they are not observed only to avoid the Punishment, and as things which were otherwise indifferent, but are observed from an averseness and loathing begot by custom to transgres them; that tho' men were secure from the Punishment if they broke them; yet Nature denies all Appetite and Inclination to violate them.

This kind of secondary Nature is eminently seen in mens averseness from some things for Food, which Custom had made detestable; as, eating the flesh of Men, Bears, Horses, Dogs, Cats, and many other things which nauseate men, and are offensive upon no other account than that Custom hath made them so, not primitive Nature, and which upon tryals of Famine have been found both eatable and nourishing; and by contrary Custom among some other Nations or People, are as desirable as other Food, as is exemplified in the Anthropophagi, the Canibals, or Men-eaters.

In this secondary way, the Copulation with the Mother, Sister, and the like, do become odious and reluctant to Nature, and generally are so where Humanity is well planted, which in the Original state of Nature, and without those induced Laws, Education, and Custom of Manners, had been as indifferent as with other

other Women. To this purpose there is a passage, and a true one, in Simplicius, speaking when the Grecians began to desert their Incestuous Marriages. — Jam cum lex & consuetudo, sororis & fratriæ consuetudine interdicat, Appetitionis non secus ab ipsis naturæ Imperio suppressæ, ita prorsus sunt immobiles, nisi forte aliquos furoris intemperies, & diræ scelerum ultrices agitarent.

So Lucan of Incest with the Mother,

Luc. 1. 8.

—Cui fas implere parentem
Quid reor esse nefas? —

To this secondary Nature hath that of St. Paul to the Corinthians reference, where he saith, v. 13, 14, 15. Doth not Nature it self teach you, That if a Man have long Hair, it is a shame unto him? Where no other Nature can be understood but Manners and Custom.

And for this are the Egyptians upbraided in the Prophets Isaiah and Jeremy, for their Bestiality in Copulation with their nearest Relations, as is most frequent in Story.

That their Flesh was like the Flesh of Horses, and their Issue as the Issue of Asses; they not observing any order of Coitus other than was found in Horses and Asses, which is the true meaning of that place. In this way it is true, that such Incestuous Marriages are unnatural, and so never made by those in whom Custom hath begot an horror and aversion to them; but on the other side, to them which have it not, there is no unnaturalness in them; for Nature originally hath not implanted that averseness in them, nor Custom prevailed to beget it, as it hath in the others.

Of

Of transgressing Natural Laws, and in what sense that is to be understood.

A third way of mens acting unnaturally is, when they violate Laws coeval with their Original Being, tho' the Laws be but positive Divine, or positive Human Laws, and not of Nature primarily, nor in any other sense, intelligible to be Natural Laws; but that they bind men as soon as men can be bound, and no Law can possibly precede them.

A second Reason of their being Natural Laws properly, is, because Man's Nature must necessarily assent to receive them as soon as it is capable of assenting, and hath no power to dissent from them; for a man hath no power to dissent from, or not to assent to his own preservation, or not to dissent from his own destruction: But not to assent to the Will, that is, to the Laws of an Infinite Power, to hurt and benefit, is to assent to his own destruction and infinite hurt, and to dissent from his own preservation and infinite benefit; for Infinite Power can hurt or benefit as it pleaseth: Therefore to assent to the Laws of the Deity is natural to Man.

Selden de
Jure Nat.

Post 230, 233,
236.

The Jews with great constancy speak of such Laws as given to all Mankind in this particular matter of Marriage, and carnal mixture, and derive them traditionally through all Antiquity, as binding all Nations and People by God's Precept, and therefore call them, among others so given, Leges Noachidarum, or the Laws of all the Sons of Noah, by which men were from the beginning prohibited,

1. Marriage or Copulation with their Mother.
2. With the Father's Wife.
3. With a Sister by the same Mother, or with a Soror uterina.
4. With the Wife of another Man.
5. Man with Man.
6. Man or Woman with Beast.

From these Laws they justifie Abram's marrying his Sister by the same Father, Amram's marrying his Father's Sister, Jacob marrying two Sisters at the same time, Thamar's endeavouring to marry her Husband's Brother, as not prohibited before the Levitical Law, or any other Marriage, those before mentioned excepted.

And

In what sense a man is said to act unnaturally against Civil Laws or Agreement.

There is a fourth way whereby a man is said to act unnaturally, which acting is subsequent to Human Laws and Contracts between man and man, which is, when after Laws made, and Contracts civilly settled, a man shall oblige himself diametrically repugnant and contrary to his former Obligation. As when

A Subject shall by Oath, promise, or otherwise, bind himself to judge or force his King, when by his Obligation to his King he is bound to obey him, and be judged by him.

When a Servant shall command and compel his Master, by whom he ought to be commanded.

To contract Marriage with two Husbands, when plenary Duty and Obedience is to be paid to each, and therefore impossible to be performed to both. So is it with a Servant who contracts his absolute Service to two Masters at the same time. Those things are unnatural, as not conforming with the nature of the Obligation a Man or Woman is under, whereof much hath been already said.

The Levitical Prohibitions of Marriage are no General Law, but particular to the Israelites.

1. All the Prohibitions of the Levitical Degrees were not equal with Mankind, as some were, viz. Marriage with the Mother, the Soror uterina, the Stepmother.

2. They were not in the restoration of Mankind declared to Noah, as a Law for Mankind: Both these appear by the Marriages of the Holy Men before mentioned within many of those Degrees.

3. They were undoubtedly delivered by Moses to the Jews, but not to Mankind; for Moses neither did nor could publish them, as the World was then peopled, to Mankind; and a Law not published is no more obligative than a Law only concealed in the mind of the Law-giver is obligative.

Post 231.

Post 305.

Rom. 3. v. 1, 2. Much every manner of way, chiefly, because unto them were committed the Oracles of God.

There is no colour of Argument, That the Prohibitions in the Eighteenth of Leviticus, were universal laws; but that it is said,

Lev. 18. v. 24. Ye shall not defile your selves in any of these things; for in all these things the Nations are defiled which I cast out before you.

Lev. 18. v. 27. For all these Abominations have the men of the Land done, &c.

How could the Land be defiled? or the men of the Land?

Dr. How could they be Abominations, if not prohibited?

To the 24. and 27 Verses of the Eighteenth Chapter of Leviticus, the answer is That those words refer to those universal laws of the Leges Noachidarum wherin Egypt and Canaan were defiled: As Incest with the mother, Soror uterina, the Fathers wife; and to those horrid offences of lying with man or beast, prohibited to all mankind from the beginning. And if the Levitical Incest were prohibited to the people of Egypt or Canaan, by some extraordinary publication (which is not probable) it follows not therefore they were prohibited to all mankind, the words before referring but to those Nations, or to one of them.

Concerning universal Obligation to the Levitical Prohibitions in Cases of Matrimony and Incest.

Though it be generally receiv'd by the Christian Churches from the primitive times of Christianity, That all Christians are obliged to observe those Prohibitions, as such which human Authority cannot dispense with; yet by what Law that Obligation was introduc'd upon the Gentiles, converted to Christianity, is not known with any satisfactory clearness. For,

1. It is evident they are not bound by them, as they were Laws promulgated by Moses to the Hebrews, both because a Law deliver'd to a particular man, or men, or to a particular Nation, or Nations, is not universal to mankind, nor binding them under any reason of a Law; for every Precept or Prohibition is but to him or them to whom it is given.

2. There

I shall therefore endeavour to shew in what notion some of these Prohibitions may be obligative, as universal positive Laws, and some obliging as moral Laws, and so universal and of Divine Obligation; the residue obliging not, quatenus delivered to the Jews, but as the same Laws delivered to them, are made universal by a new Obligation.

1. And first, All those Prohibitions mentioned in the Eighteenth of Leviticus, were positive Laws of God to them, quatenus they relate to, and terminate in degrees of Kindred therein specified; and the breach of them punishable by the punishments ordained to that end in the Mosaick Law. And in these respects none of them are binding to any other people than the Hebrews.

3. Divers of those Prohibitions are likewise of moral prohibition, and in that sense binding all men, as in the descending and ascending Line of Generation.

As the Father is prohibited to marry his Daughter, his Sons daughter, and his Daughters daughter, and further, the Levitical Prohibition for nearness of Kin, and for the respects before extends not.

But the Father is likewise morally (and universally therefore) prohibited, not only those persons, but all others descended from them interminately, that is, as far as may be known.

So in the Ascending Line, the Son is prohibited his Father and Grand mother, and no further, by the Mosaick Law; but morally not only them, but all other his great Grand-mothers interminately, as far as may be known; and so, as well as the Son, are all Males descended lineally from him. The reason of this Moral Obligation is well given by the Learned Grotius, in these words;

Grot. de Jure
belli, l. 2. c. 5. *Ab hac generalitate eximo matrimonia parentum cuiuscunque gradus cum liberis quæ quo minus illicita sint ratio ni fallor satis*
Sect. 12. pars. 2. *apparet, nam nec maritus qui superior est lege matrimonii, eam reverentiam præstare potest matri quam natura exigit, nec patri filia,*
Post. 242. *quia quanquam inferior est in matrimonio, ipsum tamen matrimonium talem inducit societatem, quæ illius necessitudinis reverentiam excludat, &c. And again,*

Grot. de Jure
belli, l. 2. c. 5. *Ut de parentibus & liberis nihil jam dicam, quippe quos, ut*
Sect. 13. pars. 3. *existimo, etiam sine expressa lege, ratio naturalis jungi satis vetat.*

By the same reason, by the Moral Law the Father or Mother cannot be Servants to their Sons or Daughters; for as Father or Mothers honour is due to them from those they serve; but as Servant, honour is due from them to those they serve, that is, their Children, who are their Masters and Superiors. As Parents their Children, whom they serve, ought to obey and reverence them. As Servants, they are to obey their Children, who are their Masters and Superiors, and to reverence them. So as this office and relation is inconsistent and repugnant between Parents and Children, and unnatural, therefore morally unlawful.

3. There are other of the Levitical Prohibitions, that by the constant tradition of the Jews were delivered to mankind in the beginning, and which they term *præcepta Noachidarum*, to which they conceiv'd all the Sons of Adam obliged; and these Precepts seem warranted by several places of Holy Scripture. These are,

That a man is prohibited his Mother, his Fathers wife, his Sister by the same venter, positively from the beginning; but a dispensation was, as to the Sisters, until a competent peopling of the world; they add the prohibition of another mans wife, which is also Moral, as that of the Mother is.

4. How the rest of the Levitical Prohibitions, in the matter of marriage, came to be so generally receiv'd by Christians, as being authorized and prescribed by God, seems to have no foundation so warrantable as that Council of the Apostles in the Fifteenth of the Acts.

Where the Gentiles are directed to observe, as necessary only, four particulars of Moses his Law, among which they are required to abstain from Fornication, which if it had been rendyed from the Septuagint, from Incest or Turpitude of Copulation, which answered the Original best; it had much facilitated the solution of this Inquiry.

For it hath no colour, That Fornication there should signifie the same with Stuprum and Scortum, and that it should be abstained from, as a special particular of the Law of Moses, being an Offence, not only prohibited by him (yet not at all among the Prohibitions in the Eighteenth of Leviticus) but by all the Nations of the Gentiles respectively, as well as by Moses. And it is plain, the word Νομικα there rendyed Fornication, most frequently signifieth in the Septuagint, both Adultery and Incest; and indeed any unlawful Copulation of man and woman.

The ends and reasons of this general Law to Christians, might be, First,

1. If the State of the Jews (as many particular men of that State did) had embraced Christianity, yet the Law of Moses had still been obliging to them, as to their Civil Government, as far as it could consist with Christianity, and had been an eternal Law, not to be abrogated but by God himself, who was the Law-giver. Therefore if the Gentiles observed not such of their Laws which preserved their Communion with the Gentiles from being odious and abominated by them. The Gentiles and the Jews, thought both had embraced Christianity, must never have had Communion; the Jews being bound by God still to observe Moses's Law.

2. This detestation among them could not sort with the Precepts of Christianity, newly received by both.

3. Marrying at what remoteness of Kindred they thought fit, was in the power of the Gentiles for the future, at their own election, without transgressing their local and native Laws: And therefore induc'd no inconvenience to observe that Precept.

4. Since all nations of the Gentiles had some restraint of marriages by humane prudence, the Apostles conceived these dictated to the Jews, to be the most convenient restraints to be voluntarily practised among Christians.

5. Other the restraints directed by that Council, all which concerned Meats, which were necessary Mediums to make Communion between men, are prohibited upon the same ground, though in themselves indifferent, and of no obligation, if not made use of in a Jew's presence, who was bound from them. But Incest being a lasting offence and scandal to the Jews, could not be concealed from them, as the eating of Meats might, and therefore was to be abstained from, with resolution to continue it, or not at all.

The three other Precepts by that Council, by Authority of the Holy Ghost, as the words impox, It hath seemed good to the Holy Ghost, and to us, are only concerning Meats, that is, First, of things offered to Idols; Secondly, of Blood; And thirdly, of things strangled; without abstinence from which, no Communion could be between the converted Jews and Gentiles. For,

1. Generally, in all Nations, eating together is the most signal instance and proof of Fellowship and Communion; and if the meat prepared be desirable by some, and odious to others of the Company, the fellowship must break.

2. Among the primitive Christians, at their Sacramental Communion, which was essential to the Christian Religion, they had their Agapæ, or Love Feasts, wherein, if the Food were such as the Christian Gentiles approv'd, and was abominable to the Christian Jews, a dissolution of the Communion between them must necessarily follow, and consequently the Precepts of Christianity be frustrated, both as to form and Christian kindness.

And this Fraction must have continued as long as the Hebrews Common-wealth lasted, which might have been perpetual; but by the dissolution of that State and Government, their Laws likewise vanished, which were peculiar to that Nation, as it will fall out in the Cases of all States, when dissolved.

Grot. lib. 1.
c. 1. S. 16.7.

If the State of England, France, or Spain, or of any other Nation, be dissolved, their respective Laws end with their dissolution; nor is it, as to this purpose, material, whether the Laws of a Nation proceed from Divine Dictates and Authority, or Humane.

For the State being dissolved, there is no lawful Coercion left for keeping, nor punishment for violating the Laws; and where that is not, there is no Law common to that people: For without coercion and punishment, every man is free, that is, he is not bound to any Law of Community, at least. But perhaps Laws may be to particular men, as to Abraham to sacrifice his Son, to which he was bound, under the displeasure of the Numen.

And thus, by the dissolution of the Hebrew Common-wealth, the Gentiles were freed from those Obligations touching Feasts, because the Jews were so too. The observation of them being, after the dissolution of the State, but the pleasure of a particular person or persons, and more than in order to preserve Communion between the people of the Jews and Gentiles, those particular Precepts were of no sanctity to oblige universally, more than any other the Mosaical Institutions.

2. As before the dissolution of the Hebrew Common-wealth, it was against Christian Charity and Love, to give scandal and offence to an Hebrew, by eating Meat detestable to him, because God had bound him from it; and the Christian Gentile might, without offending any Law, abstain from the Meat, and decline giving scandal.

So after the dissolution of the Israelitish State, when the Jew was equally free as the Christian Gentile, it grew a scandal to the Gentile, That the Jew should abhor or despise Meats which God had made lawful to the Gentile.

It hath been observed by learned men, That it may be collected from the last part of the Eighteenth Chapter of Leviticus, that there was some universal preceding Law given, to abstain from those Carnal Virtures forbid by Moses.

Defile not your selves in any of these things, for in all these the Nations are defiled which I cast out before you, verse 24. And many of the subsequent Verses are to the same purpose. And these things are called Abominations.

Wherefore it is inferred The people could not be faulty of transgressing, had there not been a Law, for without Law there can be no transgression.

But many Answers may be given to this, as First.

1. From the Eighteenth of Leviticus no pretence can be of an universal Prohibition of Carnal knowledge in all the Degrees there specified, though such Prohibitions might be to the particular Nations mentioned in Leviticus and Deuteronomy, to be therein defiled; but that is most improbable too.

Ant 230. 2. The defiling there mentioned may be intended of Sodomy, Buggery, Incest with the Mother, the Father's wife, Ant 236. 230. the Soror uterina, Adultery, agreed by the Jews to be universally prohibited, which they term Leges Noachidarum, and which are the Offences last mentioned in the Eighteenth of Leviticus before, verl. 24. before cited.

3. The

3. The marriages of many persons eminently in God's favour, before the Mosaical Law, as Abrahams marrying Sarah his ^{Ant. 22.} Sister by the Father; Jacob's marrying two Sisters; Amram's Moses his Father, marrying Jochebed his Father's Sister; Marrying the Brother's wife, as in the Story of Onan before the Mosaical prohibitions; Nachor's, Abraham's Brother, marrying Milcah his Brother Haram's daughter; and the strong Opinion that Judah himself married Thamar his Daughter in law, as well as he had Coition with her, &c permits not to believe many Copulations mentioned in Moses his Prohibitions, to have been before universally prohibited.

4. If among the Nations cast out before the Jews, as defiled in these things, Humane Laws had been made among them, as in every Nation of the Gentiles was usual to prohibit some marriages for nearness of Cognation; and those Nations had not observed, but transgressed their own Laws, as is usual in all places, to offend against their known Laws, God might therefore punish them, as daily he doth, and did always the Gentiles for not keeping their own Laws, vid. Paul to the Romans per totam Epistolam.

5. Though men cannot justly make people suffer, but for transgressing Laws which they might have kept; yet the Numen, who is just when he exerciseth absolute Dominion over his Creatures, may inflict sufferings upon a Nation for doing things he likes not, and therefore call such things abominable; as there is an Ill which begets the making of Laws to obviate and prevent it, as well as an Ill in transgressing Laws when they are made. And he which doth contrary to natural prudence, and his own persuasion of what is best, may incur the displeasure of the Numen, as well as for transgressing a Rule or Law which he might have kept. And though this way of punishing is not proper to men, it is as proper, as the other to the Deity, to whom mans thoughts, purposes, ends, and means, are open.

That the abstaining from Incestuous marriages, according ^{Ant. 223.} to Moses his Law, was a part of the Mosaical Law, precepted to be observed by the Gentiles at that Council, I think can be little doubted, and not the abstaining from what is accounted simple Fornication, which even by Moses his Law was often satisfied by marriage of the woman, and often by mony.

If

But

But it seems difficult, how that Precept, or the observance of it, could either cause, or preserve Communion between the Jews and the Gentiles, as those others did concerning abstinence from Meats prohibited to the Jews, and not to the Gentiles.

For first, Alliance and Affinity between the Jews and the Gentiles, before, and by the Law of Moses, was absolutely for bid, though the Gentiles (as many of them did for many prohibited marriages) had abstained by their own peculiar Laws from all those marriages prohibited the Jews. Therefore their Communion by Alliance or Affinity had received no advancement by abstaining from Mosaical Incests in that respect.

Lev. 18. v. 24, &c.

But besides the general Interdict of Alliance with the Gentiles, the Jews were interdicted in a special manner, any alliance or conversation with the Nations, whose Land they were to enjoy and inherit, and who were cast out before them, as being defiled in all those Copulations of Kindred, prohibited the Jews, as appears from Verse the Four and twentieth to the end of the eighteenth Chapter of Leviticus, and which Iniquity was visited by making the Land vomit out the Inhabitants.

2. Verse the Thirtieth, the Jews are charged not to commit any one of those abominable Customs committed before them; and if they did, they were punished by death, as appears Leviticus the Twentieth. This was enough to cause a particular Detestation and abhorrence in the Jews, of such who accustomed themselves to such marriages, or any of them, above others, of the Gentiles.

3. The Nations cast out of their Land for committing those things, appear to be Seven; The Hittite, the Gergashite, the Amorite, the Canaanite, the Perizzite, the Hivite, and the Jebusite, whose names they were commanded to destroy from under Heaven, Verse the Four and twentieth of that Chapter; accordingly it appears they did so. Deuteronomy the Second and Third Chapters, The Amorite, and those under Og, King of Bashan were, Man, Woman, and Child, destroyed.

Chapter the Seventh, Verse second and third, no Covenant was to be made with, nor marriage between them.

Of the Cities of these people which the Lord thy God giveth Deut. 20. thee for an inheritance, Thou shalt save alive nothing that breatheth, but thou shalt utterly destroy them, which shews their destruction was not for transgressing a Law given them by God, as their Law-maker, for they were destroy'd which had not offended against the Law, as well as they which had. But it was an Act of God's absolute dominion over his Creatures, as the Potter may do what he listeth with his Clay, which must not say why hast thou made me thus.

Whereas they had differing commands concerning Cities far from them; As, 1. To offer them peace; 2. If they accepted it, to make them Tributaries; 3. If they refused it, to kill the Males with the Sword, but to spare the women and children, Deut. 20. from verse 10. to verse the Fifteenth.

It is hence not improbable the Jews had great aversness to the Communion of such, whose mixtures in marriage were alike to these Nations, though they were not of these Nations; for the vengeance ordained against them appears not to be for other causes (than for those incestuous Copulations) which were not common to all other the Nations of the Gentiles, as well as to them, that is, Idolatry: And for this reason,

The Apostles might direct the Gentiles to abstain from marriages that would render them odious to the Jews, and which the Christians ever after continued as most conformant to God's will in the fitness of marriage.

But this is not reason enough to make all these marriages to be prohibited to the Gentiles absolutely by Divine Institution, as unholie in themselves, without relation to the communion with the Jews, so as to make it absolutely unlawful to change them by any Humane Law upon any occasion. But it is never prudent to change a Law which cannot be better'd in the subject matter of the Law.

Accordingly if we examine well, perhaps dispensations will be found given by the Christian Churches for marriages, within most of those Mosaical Degrees, and particularly in those marriages instanc'd in which were lawful before the Law of Moses, and which have not a moral inconsistency with them, and so a natural iniquity, and which therefore are prohibited among all civilized Nations, whether ancient or modern, as well as among the Jews, for the most part.

Selden de Ju-
re Gentium.

In some places some particular examples may be to the contrary, for special reasons of Revelation or Prophecy believ'd, as the Mother to marry the Son.

Accordingly it is affirmed by the Statutes of 28 H. 8. c. 7. & 25 H. 8. c. 22. That the marriages enumerated in both those Acts to be prohibited by Gods Law, were notwithstanding allow'd by colour of Dispensations by mans power. The words of the Statute of 28. are, after the recital of the prohibited marriages, All which marriages, albeit they be plainly prohibited and detested by the Laws of God, yet nevertheless, at some times, they have proceeded under colours of Dispensations by mans power, which is but usurped, and of right ought not to be granted, admitted, nor allow'd

The same words are in the Statute of 25. but instead of, All which marriages, the words are, Which marriages, &c.

The second Question, What are the Levitical Degrees, I omit, because the marriage in question is in no sort in the Degrees.

Observation.

And by the way it is very observable, That as we take the Degrees of Marriage, prohibited by God's Law, to be the Levitical Degrees expressed, or necessarily implied in the Eighteenth of Leviticus, upon parity of reason, or by Argument, a fortiori.

So there are some in Leviticus, which by the Act of 28 H. 8. cap. 7. and otherwise in our enumeration of the Levitical Degrees, we admit as absolutely prohibited, which in the Levitical Law, and in the meaning of the Eighteenth of Leviticus, were not absolutely, but circumstantially prohibited; that is,

1. The marriage of a man with his Brother's wife, which by 28 H. 8. cap. 7. is absolutely prohibited, and commonly receiv'd to be absolutely prohibited, by the Levitical Degrees.

But was not so by the Levitical Law, nor by the meaning the Eighteenth Chapter of Leviticus, but when the dead brother left Issue by his wife.

But if he did not, the surviving Brother was, by the Law, to marry his wife, and raise Issue to his Brother

This

3. In Junius and Tremellius's Translation, done with regard to the Septuagint and the Original, the Twentieth of Leviticus, verse the twentieth, is rendred Quisquis cubaverit cum Amico sua nuditatem patrui sui reteexit, where expressly, instead of, and uncovered his Uncle's shame it is uncover'd his Uncle, his Father's Brother's shame, which makes it the same with the Eighteenth of Leviticus, verse the fourteenth.

I shall therefore first agree, That marriage with the Grand-mother, Great-grand mother, and with the Great-grand-father, and so upwards, without limit; is, though not expressed, equal.

^{Ant. 232.} ^{2 Ven. 12.18.} It is prohibited in Leviticus, as marriage with the Father, Mother, or Grand-father, to the Son or Daughter; So as in the right Ascending Line of Generation there can be no lawful marriage.

1. The Father and Mother are the immediate natural Causes of the being of their Children, and the Grand-father and Grand-mother are natural mediate causes of their being, and so upwards, in the right ascending Line interminately; for a man could no more be what he is, without his Grand-father and Grand-mother, and so upwards, than without his Father or Mother: Therefore they are really Parents, and necessary mediate causes of bringing the Children to have being, and consequently what is due of reverence or acknowledgment for his being, from the Child to Father or Mother, is likewise due to those other Relations in the Ascending right Line.

But the Uncle quatenus Uncle, &c. doth no more contribute to the natural being of the Nephew or Niece, than as if he had not at all been.

The marriage of the Son or Daughter with Grand-mother or Grand-father, and so with any Ancestor, Male or Female, in the right Ascending Line, is, after Laws determining the knowledge and reverence due to Parents, unnatural and repugnant in it self.

For there is unnaturalness in Civil things, when constituted, sometimes;

Though there be no Master or Servant originally in nature, but only parity, yet after Laws have constituted those Relations.

A. cannot at the same time be both Master and Servant to B. there is a repugnancy in the nature of those two Offices, to be consistent in the same persons at once.

A Father or Mother cannot be Servant to their Son or Daughter; for under the relation of Father or Mother, the Son is to obey them, but in that of Servant, they to obey him, which is repugnant, and against the nature of those Relations.

Under the Law it was not forbidden a man to Curse his Servant, but Death to Curse his Father or Mother. A man might correct and chastise his Servant qua such, but penal alike to chastise his Father or Mother in this sense.

The marriage of the Son with his Mother, or the Daughter with her Father, are unnatural.

For as a Husband to her, the Son is both to command and correct the Mother as his wife, but as a Son to be commanded, and endure her Correction as Mother.

So between the Father and Daughter, there is a Reverence from the Daughter to the Father, inconsistent with the parity between man and wife; and Laws give often a power over the daughter, which they forbid over the wife.

And the reverence and obedience from the Grand-child to the Grand-mother, in what degree soever, is the same as to the Mother, and the same consequences follow.

For if the Mother or Father have power absolute, or in tantum, over the Son or Daughter, to create reverence to them, the same hath the Grand-mother, or Grand-father, and so forwards.

For if B. the Father have absolute or qualified power over A. the Son, and C. the Grand-father hath the same over B. the Father, then hath C. the Grand-father the same over A. the Son, not immediately but mediately by the Father.

To this purpose the Case put in Plat's Case in the Com. is most apposite. A woman Guardian of the Fleet marries her Prisoner in Execution, he is immediately out of Execution; for the Husband cannot be Prisoner to his Wife, it being repugnant, that she, as Jaylor, should have the Custody of him, and he, as Husband, the Custody of her.

To this purpose also, it is remarkable what that great Scholar and Lawyer, Hugo Grotius hath; Eximo ab hac generalitate matrimonium parentum cuiuscunque gradus cum liberis quæ quo minus licita sint ratio, ni fallor, satis appareat. Nam nec maritus qui superior est lege matrimonii eam reverentiam præstare potest matri bellii, l. 2. c. 5. Grot. de Jure Paragr. 12.

But

But as to other Relations, the same Author, in the same place,

De Conjugiis eorum qui sanguine aut affinitate junguntur satis gravis est quæstio, & non raro magnis motibus agitata; nam causas certas, ac naturales cur talia conjugia, ita ut legibus aut moribus vetantur illicita sint assignare qui voluerit, experiendo discet quam id sit difficile, imo præstari non possit.

I add only, That as the mutual duties of Parents and Children consist not with their marrying one another; so the Procreations between them will have a necessary and monstrous inconsequence of Relation.

For the Son or Daughter, born of the mother, and begot by the Son, as born of the mother, will be a Brother or Sister to the Father, but as begot by him, will be a Son or Daughter.

So the Issue procreate upon the Grand-mother as born of the Grand-mother, will be Uncles or Aunts to the Father, as begot by the Son, they will be Sons or Daughters to him, and this in the first degrees of Kindred.

Besides, by the Laws of England Children inherit their Ancestors without limit in the right ascending Line, and are not inherited by them. But in the Collateral Lines of Uncle and Nephew, the Uncle as well inherits the Nephew, as the Nephew the Uncle.

In the Civil Law the Agnati, viz. the Father, or Grand-father's Brother, are loco parentum; and the Canons borrow it thence, but that is because they were Legitimi Tutores, or Guardians by Law to their Nephews; with us the Lord, of whom the Land is held, is Guardian, or the next of Kin to whom the Land cannot descend, and by the same reason they should be loco parentum.

In a Synod or Convocation holden in London, in the year 1603. of the Province of Canterbury, by the King's Writ, and with Licence under the Great Seal to consent and agree to such Canons and Constitutions Ecclesiastick as they should think fit.

Several Canons were concluded, and after ratified under the Great Seal, as they ought to be; among which the Ninety ninth Canon is this:

No person shall marry within the Degrees prohibited by Gods Canons 1. Juc. 1603. Can. 99. Post. 303. 311. Law, and expressed in a Table set forth by Authority, in the year of our Lord, 1563. and all marriages so made and contracted, shall be adjudg'd incestuous and unlawful: And the aforesaid Table shall be in every Church publickly set up and fixed, at the charge of the Parish.

This Table was first publigh in Arch-bishop Parker's time, in 1563. I know not by what Authority then, and after made a Canon of this Convocation, with the Kings Licence under the Great Seal, and so confirm'd, and since continually set up in Parishes.

By which expressly the Degrees by Gods Law prohibited, are said to be expressed in that Table, and is the same as, No person shall marry within the Degrees prohibited by Gods Law, and which are expressed in the Table. Any other Expo. Post. 312. fiction of the Canon will be forc'd and violent, and the Table set up for the Peoples direction from Incest, but a snare and a deceit to them.

And this marriage is not prohibited in that Table,

There is an Objection, That by the Canon and Civil Law this Degree of Marriage in question is prohibited.

It is true; but by the Statute of 32 H. 8. c. 38. All Prohibitions by the Canon or Civil Law, quatenus Canon or Civil Law, are wholly excluded, and unless the marriage be prohibited by the Divine Law, it is made lawful.

But suppose the Canon or Civil Law were to be taken as a measure in the subject of marriage of what were lawful.

With the Canon Law, of what time would you begin? for it varies as the Laws Civil of any Nation do, in successive Ages. Before the Council of Lateran, it was another Law than since, for marriages before were forbid to the Seventh degree from Co- Ant. 213. Germani inclusively, since to the Fourth.

Every Council varied somewhat in the Canon Law, and every Pope from the former, and often from himself, as every new Act of Parliament varies the Law of England, more or less; and that which always changeth can be no measure of Rectitude, unless confin'd to what was the Law in a certain time, and then no reason will make that a better measure than what was the Law in a certain other time: As the Law of England is not a righter Law of England in one Kings Reign, than in another, yet much differing.

Nerva forbade it; Heraclius permitted it. Emperour with Agrippina his Brother's daughter, the marriage of the Uncle with his Neece, was not allowed among the Romans. But by a Law of the People and Senate upon that Decalogue, such marriages were permitted. Many others of the like kind.

Now did the Canon Law, and perhaps truly, take more persons to be prohibited within the Levitical Degrees, than are there expressed: What else is the meaning of that place in Levitico vero prohibita fuerunt fere duodecim personæ, &c. in the Exposition of the Arbor Consanguinitatis & Affinitatis.

**Reformatio Legum Ecclesiasticarum ex
Authoritate primum Regis Henrici 8.
inchoata, deinde per Regem Edwardum 6.
provecta, de gradibus in Matrimonio
prohibitis.**

Deus in his gradibus certum jus posuit Levitici 18. & 20. Capite, quo Jure nos, & omnem posteritatem nostram teneri necesse est. Nec enim illorum capitum præcepta veteris Israelitarum Reipub. propria fuerunt, ut quidam somniant, sed idem authoritatis pondus habent quod Religio nostra Decalogo tribuit, ut nulla possit humana potestas quicquam in illis, ullo modo constituere.

Hoc tamen in illis Levitici capitibus diligenter animadvertisendum est, minime ibi omnes non legitimas personas nominatim explicari, nam Spiritus Sanctus illas ibi personas evidenter, & expresse posuit ex quibus similia spatia reliquorum graduum, & differentiæ inter se facile posuit conjectari & inveniri. Exempli causa, cum filio non datur uxor mater, Consequens est, ut ne filia quidem patri conjux dari potest, & si patrui non licet uxorem in matrimonio habere, nec cum Avunculi conjugi nobis nuptiæ concedi possunt.

**Admitting this marriage out of the Levitical Degrees,
whether it be so pleaded as that we ought to deny a
Consultation.**

Faults

Faults in the Pleading.

The Plaintiff sets forth the Act of 32. and particularly, That all Marriages are thereby lawful, contracted between lawful persons, and that all persons are lawful, not prohibited by Gods Law to marry. Then he sets forth another Clause, That no marriage shall be impeach'd (Gods Law excepted) made out of the Levitical Degrees.

Then sets forth his marriage with his Wife, being formerly married to Bartholomew Abbot, his Grand-fathers brother (and consequently his great Uncle) there being no pre-contract of either side, which was lawful Secundum Jura Divina & Humana.

And that he was libell'd for his marriage in the Spiritual Court, as incestuous and unlawful, and sets forth the Articles of the Libel in particular, and the prosecution for a Divorce.

But both not avert, That the marriage is without the Levitical Degrees, as he should have done. Post. 302.

Upon which Declaration, the Defendant demurs, and prays a Consultation.

Whereas, if the Plaintiff had aver'd the marriage to be without the Levitical Degrees, the Defendant must either have demurr'd upon that single point, or have been forz'd to have confess'd that it was out of the Levitical Degrees, but was notwithstanding against Gods Law, upon the words of the Act, No marriage shall be impeach'd, Gods Law excepted, that is, without the Levitical Degrees.

So as by his manner of Pleading, the Court is now to Judge, not whether the marriage be without the Levitical Degrees, but whether it be against Gods Law in general. The Defendant hath not articled, That Abbot knew the wife carnally; and then it is not a marriage against Gods Law by 28 H. 8. cap. 7. nor that it is within the Levitical Degrees.

And upon this manner of Pleading, after a Prohibition granted a Consultation was awarded in Mann's Case.

Mann had married his first wife's sister's daughter, and was sued before the High Commissioners; for although this was not prohibited within the Levitical Degrees, yet because degrees more remote are forbidden, they gave sentence of Divorce. And he grounded his Prohibition upon the Statute of 32 H. 8.

c. 38. And a Consultation was prayed and granted, because the Prohibition is not to be, if it be not without the Levitical Degrees, and here it was general, and therefore not good.

Mann's Case. The same Case is in Moore, who Reports the Grant of a Moore f. 907. Prohibition in the Case, but mentions not the Consultation which was moved so long after the Prohibition; and therefore alters nothing of Crook's Report. But the Record of this Case cannot be found.

Cok. Lit. f. 235. a.
Post. 322.

There is another Case of one Richard Pearson, not Parsons, wherein a Prohibition was granted out of this Court in the like case as Manns, for marrying his wifes sisters daughter, in Trinity Term 2 Jac. Rot. 1032.

Sir Edward Coke saith he was drawn into question in the Ecclesiastical Court for the Marriage, alledging the same to be against the Canons.

And that it was resolved by the Court of Common Pleas, upon Consideration of the Statute of 32 H. 8. cap. 38. that the Marriage was not to be impeach'd, because declared by the said A& to be good, in as much as it was not prohibited by the Levitical Degrees. This Case is again remembred by Sir Edward Coke in his Comment upon this Statute of 32 H. 8. In the latter Editions of his Littleton it is not printed, but it seems omitted, not by his consent, because he remembers it in his Magna Charta upon that Statute, long after printed.

But I find there was a Consultation granted in Hillary Term after the prohibition granted, but find no appearance of Plea of the Defendant.

Post. 249.

But by the Record of that Case, the Plaintiff declares, Qui quidem Richardus & Anna fuerunt, & sunt legales personæ insimul maritati per legem Dei minime prohibitæ ac extra leges Leviticales.

Quidam tamen machinans matrimonium prædictum secundum legem Dei & Hominum legitime celebratum dissolvere, Prætendens matrimonium illud fore incestuose eodem Henricum & Annam, &c. in placitum trahi procuravit.

Then sets forth the Articles of the Libel, whereof 1. is,

Item quod præmissorum ratione præfat. Anna fuit ac est Affinis tui præfati Richardi, & in gradu de Jure prohibito pro aliquo matrimonio inter te, & eandem contrahendo aut habendo notorie

The same Case is in the Reports which pass for Mr. Noye's, f. 29, but mistaken, for there in place of his Wives sister, it is Fathers sister.

Hill. 21 Car. II. This Case was, by the King's Command, adjourn'd for the Opinion of all the Judges of *England*, Trin. 22 Car. II. The Chief Justice delivered their Opinions, and accordingly Judgment was given, That a Prohibition ought to go to the Spiritual Court for the Plaintiff.

Mich.

And likewise had, and used to have, solam & separalem Pasturam prædict. Clausi vocat. *Westrow-hills*, from the Feast of St. Edmund every year, to the Five and twentieth of March, for feeding of all their Cattel (Hogs, Sheep, and Nothern Steers except) levant and couchant, &c. Excepted that the Tenants of the Demesne of the Mannor every year, from the said Feast to the Five and twentieth of March, by custom of the said Mannor depastured their Sheep there.

That at the time of the *Trespass*, the Defendant put in his own Cattel, levant and couchant, upon his said *Messuage*, Prout ei bene licuit, and averteth not that none of his said Cattel were, Porci, Oves, or Juvenci, called Northern Steers, but *Petit Judicium*.

The like Plea he makes for the Closes called the Haylands Delf and Brink, but that the free Tenants, as before, and customary Tenants, had solam & separalem Pasturam pro omnibus averiis (Porcis, Ovibus, & Juvencis, called Northern Steers, excepted) for all times of the year.

And that he put in Averia sua, levantia & cubantia, super tenementum prædictum prout ei bene bene licuit, & *Petit Judicium*.

Cum hoc quod verificare vult quod nullus bovium prædict. ipsius Willielmi fuerunt Juvenci, vocat. *Northern Steers*.

Whereas no mention is of putting in Oxen, but Averia sua in general, and no averment that no Sheep were put in.

The Plaintiff demurs upon this Plea.

Exceptions to the Pleading.

The Defendant saith he was seis'd de uno antiquo Messuagio, being one of the freehold Tenements of the said Mannor, and that there are divers freehold Tenements within the said Mannor, and that omnes Tenentes of the said Tenements, have had solam & separalem pasturam for all their Cattel, levant and couchant, except Porcis, Ovibus, and Juvencis, called Northern Steers, in the place called *Westrow-hills*, and that he put his Cattel, levant and couchant, prout ei bene licuit.

i. That

1. *If discessit, the Aille is Quare discessivit cum de Communia pasturæ suæ.*

If surcharg'd, an Admensuratio pasturæ is Quare Supererat Communiam pasturæ suæ.

^{22. Att. p. 48.} ^{Cok. Litt. 4. b.} ^{Post. 256.} *Trespass lies not for a Common, but doth for Sola & separalis pastura granted to one or more jointly; But not here, where all cannot join in Action, and several Actions would cause several Fines to the King for the same offence, which the Law permits not.*

We cannot allow but for Damage done to his Common, not for his Sola & separalis pastura.

2. *No Common of Pasture can be claimed by Custom within the Mannor, that may not be prescribed for out of the Mannor, for what one might grant another might. But no Prescription can be for Sola & separalis pastura out of a Mannor to such Common. Therefore they shall not claim it by Custom in the Mannor.*

For Copy-holders must prescribe out of the Mannor that the Lord for himself, and his Tenants at will, hath always had Common in such a place, which Prescription gives the Lord what this Custom would take from him.

3. *No man enjoys a Real Profit, convey'd from the Lord, which he cannot re-transfer again to the Lords benefit; but a Commoner of such a Common cannot Release, Surrender, Extinguish, or otherwise Convey this Common to the Lords benefit.*

<sup>Smith & Gate-
woods Case.
3 Jac. Cr. f. 15. 2.
6 Rep. f. 59.
15 E. 2. Title
Prescript. pl.
51.</sup> *Which is the reason in Gatewood's Case, That Inhabitants not corporate cannot prescribe in a Common; none of them can extinguish or release that Common he claims.*

A man prescribed in the sole Pasture, after carrying off the hay, to a certain time of the year.

So tempore E. 1. a Prescription for all the Pasture, and the Owner of the Soil could only plough, sow, and carry his Corn, but not depasture the Grass at all.

But no Case, where different persons had by different Title, as here, in the same ground, Solam & separalem pasturam.

No; no Case where Sola & separalis pastura is granted to a man and his Heirs; which seems the same as granting omne proficuum terræ: For where it is alledged there may be Mines, Woods, and the like, notwithstanding the Grant of Solam & separalem pasturam, these are casual, and not constant profits; they may be, or not be at all.

when

When a man bings an Action, as an Entry sur Difcisin, or the like, where he must alledge Esplees, the profit of a Mine will not serve, but for the mine it self, which may be a divided Inheritance from the Soyl.

So may Woodland be a divided inheritance from the Soyl, and the profit of cutting of that is not Esplees of the Land generally, but of the Woodland, but the profits of all and every part, are the Esplees of the Land, and prohes lessin of the whole Land, which are in the form of pleading the Corn, Gras, and Hay, which are profits pour moy & pour tout, and where Sola & separalis pastura is granted generally away, lessin cannot be alledg'd in taking any of these.

It is agreed generally for Law, That a Prescription to have Cok. Lit. c. 122. a. Solam & separalem Communiam in certain Land, doth not exclude the Owner of the Soyl to have Pasture or Estovers.

But by that Book a man may prescribe to have Solam vesturam terræ from a certain day, to a certain day in the year, and so to have Solam pasturam terræ. And so are the Books of 15 E. 2. pl. 51. and of E. 1. pl. 55. in Fitz herbert, Title Prescription, but they go no further, nor determine what Estate he hath who claims Solam & separalem pasturam to him and his Heirs, excluding the Lord wholly from any Pasture, Hay, or Corn.

In granting or prescribing to have solam & separalem Communiam, why the Lord is not excluded, is not clear by that Book, or any other. For,

There are two notions or senses of the word Communia, the one, as it signifies that Interest in the Common which one Commoner hath against another, not to have the Common surcharg'd. And is that Interest, to which the writ De Ad- Fitz. Na. Br. de Admens- ratione pa- sturæ, 125. a. mensuracione pasturæ relates, which only lies for Commoner against Commoner, and not for a Commoner against the Lord, or for the Lord against a Commoner, as is cleare by Fitz-herbert.

And in this sense there may be Sola & separalis Communia, for only one may have right of Common, and no more, either by Grant or Prescription. So in this sense one part of the Tenants of a Mannor may have the sole right of Commoning in a certain place, excluding the other part of the Tenants, and may claim there Solam & separalem Communiam a cæteris Tenentibus Royston's C. 4. Rep. Manci.

The other notion of Communia is, when one or more hath right to Pasture with the Owner of the Spoyl; and in this sense it is impossible for a man to have solam & separalem Communiam, for one cannot have that alone which is to be had with another, nor do that alone which is to be done with another.

Post. 257.

So as a man may have Solam & separalem Communiam in that sense, that none is to be a Commoner but himself, but not in that sense that none else should depasture the Land but he; for Communia cannot signifie an absolute several.

As 'tis a Contradiction, that a Common, which is to more than one, can be a several, and belong but to one.

So it is an equal Contradiction, That what in its nature is to be the right of one only, can be Common, and the right of more than one.

Others cannot have what is only to be had by me, more than I can have only what is to be had by others with me.

Ant. 254.

Therefore Sola & separalis Pastura may be enjoyed by one, or by many jointly, and by way of Subdivision, but not by many by different Titles, as belonging to several free-holders, for Sola & separalis pastura can be, but Soli & separatim.

Na. Br. f. 231.
a. 1. c. 8 E. 4.
f. 17. Br. grants.
pl. 95.

Co. Litt. 164.

If the King had a Corody from an Abby of two or three loaves of Bread per diem, and of so many measures of Drink, this might be granted to two or three several persons. But if he had a Corody of one Meal a day, or Sustenationem unius Vlecti per diem, this could not be granted but to one, because its nature was confin'd to one.

A man cannot have an Assise of Common in his own Spoyl, nor an Admensuratio pasturæ, and a Common being a thing that lies in grant, he cannot grant it to himself, and no other can grant it in his Spoyl to him.

So as I conclude, one or more may have Solam & separalem Communiam from other Commoners, but not from the Lord, who is no Commoner.

I cannot discern the use of this kind of Prescription for the Tenants; for if it be to hinder the Lord from approving the Common, I think they are mistaken.

Coke 2. Instit.
f. 86. 475.
West. 2. c. 46.

The Statute of Merton gives the Owner of the Spoyl power to approve Common Grounds appendant, or appurtenant by Prescription, as this is, if sufficient Pasture be left for the Commoners, without considering whether the Commoners had the Common solely to themselves, excluding the Lord, or otherwise. For as to Approbement (which the Statute provided for) the Lord was equally

2. The granting solam & separalem pasturam of ox in Black-acre, may signifie the exclusion of any other person to have Pasture in Blackacre, but the Grantee, in which sense the word Solam signifieas as much as totam pasturam.

3. If the Grant be of all the Pasture, the Grantor reserves nothing to himself of that which he grants, but all passes into the Grantee; but if the Grantor restrains the Grant, after general words of granting all the Pasture, the Restriction is for the benefit of the Grantor.

Therefore when the Grant is of Solam & separalem pasturam of ox in Black-acre, all the Pasture is supposed to pass, without restriction, to the Grantee; but if words follow in the Grant, pro duabus vaccis tantum, or pro avariis levantibus & cubantibus super certum tenementum, that is a restriction for the benefit of the Grantor; for a man cannot in the same Grant restrain for his own benefit the largeness of his Grant, and yet have no benefit of his restriction.

The Court was divided; The Chief Justice, and Justice *Tyrrell* for the Plaintiff. Justice *Archer* and Justice *Wylde* for the Defendant.

Hill.

They find that the said William Rose, the Tenant, before the Trespass, viz. the First of June, 14 Jac. died at Easter-gate, in the said County of Sussex, seis'd as aforesaid.

That at the time of his death, he had Issue of his body lawfully begotten, George Rose his only Son, and Mary and Katherine his two Daughters.

That George, the Son, entered into the Premises the First of July, 14 Jac. and was seis'd prout Lex postulat.

Then after, and before the time of the Trespass, viz. June the Eight and twentieth, 14 Car. 2. George died so seis'd of the Premises at Easter-gate aforesaid.

That at the time of his death he had Issue of his body two Daughters, Judith now wife of Daniel Sheldon, one of the Defendants, and Margaret now wife of Mr. Joseph Sheldon, the other Defendant.

That after the death of George their Father, the said Judith and Margaret entered, and were seis'd before the Trespass supposed, prout Lex postulat.

That Mary, one of the Daughters of the said William Rose, July the First, 1 Car. 2. died, and that Katherine her Sister surviv'd her, and is still living.

That the said Katherine, October the First, 20 Car. 2. at East-Grimsted, entered into the said Tenements, and was seis'd prout Lex postulat, and the same day and year demis'd the same to the said Thomas Gardner, the Plaintiff, from the Feast of St. Michael the Arch-angel then last past, for the term of five years then next following; By virtue whereof the said Thomas Gardner entered, and was possessed, until the said Joseph and Daniel Sheldon, the same First day of October, 20 Car. 2. entered upon him and ejected him.

If upon the whole matter the Justices shall think the said Joseph and Daniel Sheldon culpable; they find them culpable, and assess Damages to Six pence, and Costs to Twenty shillings. But if the Justices shall conceive them not culpable, they find them not culpable upon the words, My will is, if it happen my Son George, Mary and Katherine my Daughters, do dye without Issue of their Bodies lawfully begotten, then all my Free Lands, which I am now seized of, shall come, remain, and be to my said Nephew William Rose and his Heirs for ever.

2. In the second place I shall shew, That the words of this Will do not import a devise to the son and the two daughters for their lives jointly, with respective Inheritances in tail to the heirs of their several bodies, by any necessary implication, but only by an implication that is possible by construction.

3. In the third place I shall shew, That being so as to the Case in question, it is not material whether the devise by way of Post. 268.
Remainder to the Nephew, be void or not.

4. In the fourth place, ex abundante, and to make the Will of the Testator not ineffectual in that part of the Will, I shall shew, That the Nephew hath not the Land devis'd to him, when the son and the two daughters dye without Issue of their respective bodies, by way of Remainder, which cannot be but by way of Executory devise, which well may be.

5. That by such Executory devise no perpetuity is consequent to it; or if it were, such a perpetuity is no way repugnant or contrary to Law.

To manifest the difference taken between an implication in a Will that is necessary, and implication that is only possible, the first Case I shall cite is that known Case 13 H. 7. which I shall exactly put as it is in the Book at large.

¹³ H. 7. f. 17.
Br. Devise pl.
52.

A man devis'd his Goods to his wife, and that after the decease of his wife, his son and heir shall have the House where his Goods are: The son shall not have the House during the wives life; for though it be not expressly devis'd to the wife, yet his intent appears, the son shall not have it during her life; and therefore it is a good devise to the wife for life, by implication, and the Testator's intent, Quod omnes Justiciarii concuerunt. Here I observe,

1. That this was a devise of the House to the wife by necessary implication; for it appears by the Will that the Testator's son and heir was not to have it until after the death of the wife, and then it must either be devis'd to the wife for life by necessary implication, or none was to have it during the wives life, which could not be.

2. I observe upon this Case, That though the Goods were by particular devise given to the wife, and expressly, that was no hindrance to the wives having the House devis'd to her also by her husband by implication necessary: which I the rather note, because men of great name have conceiv'd, That where the devisee takes any thing by express devise of the Testator, such devisee shall not have any other thing by that Will devis'd, only by implication.

^{Post. 268.}
^{1 Vent. 230.}
^{1 Med. 189.}
^{2 Jones 172.}
^{173.}

Which difference if it were according to Law, it makes clearly against the Plaintiff, because his Lessor being one of the Daughters of the Testator, had devise'd to her expressly 600 L for a Portion, and therefore she should not have any Estate in the Land by the same Will, by a Devise by Implication, as is pretended.

But the truth is, that is a vain difference that hath been taken by many, as I shall answ. evince, and therefore I shall not insist upon any Aid from it to my conclusion.

3. I note that this Devise being before the Statute of 32 H. 8. of Wills, the House devise'd must be conceiv'd deputable by Custom at the Common Law.

Before I proceed further, I must take notice that Brook, in abridging the Case of 13 H. 7. in the same numero, saith,

It was agreed, tempore H. 8. per omnes, That if a man will that J. S. shall have his Land in Dale, after the death of his wife, the wife shall have the House for her life by his apparent intent. I note first, That this Case is imperfectly put in Brook, for it mentions a devise of the Land in Dale to J. S. after the death of his wife, and then concludes that the wife shall have the House for her life by his apparent intent; whereas no mention is made of a House, but of the Land in Dale in the devise. And this Case seems to be only a memory of another Case, not abridg'd by Brook out of any other Year-book, but reported in his Abridgment in the Title Devise, as a Case happened in 20 H. 8. which is,

That if man will that J. S. shall have his Land after the death of his wife, and dies, the wife of the Deviseor shall have those Lands for term of her life by those words, ratione intentionis voluntatis. Which Cases being in truth but one and the same Case, seem to go further than the Case of 13 H. 7. for there, as I observ'd before, the wife was to take by necessary implication, because the Heir was excluded expressly by the Will, during the life of the wife.

But by this Case in Br. Title Devise n. 48. & 52. there is no excluding of the Heir, and yet it is said the wife shall have the Land during her life by implication, which is no necessary implication, as in the Case of 13 H. 7. but only a possible implication, and seems to cross that difference I have taken before.

But

But this Case of Br. hath many times been denied to be Law, ^{1 Ven. 323.} and several Judgments have been given against it. I shall give ^{376.} you some of them, to justify the difference I have taken, exactly ^{2 Cro. 75.} as I shall press the Cases.

Trinity 3 E. 6. A man leis'd of a Mannor, part in Demesne, ^{3 E. 6. Moores} and part in Services, devis'd all the demesne Lands expressly to ^{Rep. 1.7. n. 24.} his wife, during her life; and devis'd to her also all the Services and chief Rents for Fifteen years, and then devis'd the whole Mannor to a stranger after the death of his wife.

It was resolved by all the Justices, That the last devise should not take effect for any part of the Mannor, but after the wives death; but yet the wife should not have the whole Mannor by implication during her life, but should have only the demesnes for her life, and the Rents and Services for Fifteen years, and that after the Fifteen years ended the Heir should have the Rents and Services as long as the wife liv'd: There being no necessary Implication that the wife should have all the Mannor during her life, with an exclusion of the Heir; she had no more than was explicitly given her by the Will, viz. the Demesnes for life, and the Rents and Services for Fifteen years; but after the Fifteen years the Heir had the Rents and Services, for it could be no more at most but a possible implication that the wife should have the whole Mannor, during her life.

But with a small variance of this Case if the Demesnes had been devis'd to the wife for life, and the Services and Rents for Fifteen years, and the whole Mannor after the wives life to J. S. and that after the wives life, and the life of J. S. his Heir should have had the Demesnes, and Services, and Rents, in that Case it had been exactly the same with the Case of 13 H. 7. because the Devisors intent had been then apparent that the Son was not to have the Mannor, or any part, until the wife and stranger were both dead, and as it was adjudg'd the stranger had nothing in the Mannor until the wives death; therefore in that case, by necessary implication, the wife must have had both Demesnes and Services during her life, notwithstanding the explicit devise to her of the Rents and Services for Fifteen years, otherwise none should have had the Rents and Services after the Fifteen years, during the wives life, which was not to be intended.

^{15 El. Moore} ^{£. 123. n. 265} Another Case I shall make use of, is a Case Paschæ 15 El. A man leis'd of a Messuage, and of divers Lands occupied with it, time out of mind, leased part of it to a stranger for years, and after made his last Will in these words, I will and bequeath to my wife my Messuage, with all the Lands thereto belonging in the occupation of the Lessee, and after the decease of my wife, I will that it, with all the rest of my Lands, shall remain to my younger Son.

The Question in that Case was, Whether the wife should have the Land not leased by implication for her life, because it was clear, the younger Son was to have no part, until the death of the wife. And the Lord Anderson at first, grounding himself upon that Case in Brook (as it seems) of 29 H. 8. twice by Brook remembred in his Title Devise n. 28, and after n. 52. was of opinion, That the wife should have the Land not leased by implication: But Mead was of a contrary opinion, for that it was expressly devis'd, That the wife should have the Land leas'd; and therefore no more should be intended to be given her, but the Heir should have the Land not in lease, during the wives life. To which Anderson, mutata opinione, agreed. Hence perhaps many have collected, That a person shall not take Land by implication of a Will, if he takes some other Land expressly by the same Will; but that is no warrantable difference.

For vary this Case but a little, as the former Case was varied, That the Land in lease was devis'd to the wife for life, and after the death of the wife, all the Devisors land was devis'd to the youngest Son, as this Case was; and that after the death of the wife, and the youngest son, the Devisors Heir should have the Land both leas'd, and not leas'd: it had been clear that the Heir (exactly according to the Case of 13 H. 7.) should have been excluded from all the Land leas'd, and not leas'd until after the death of the wife and the younger son. And therefore in such case the wife, by necessary implication, should have had the Land not leas'd, as she had the Land leas'd by express devise, and that notwithstanding she had the leas'd Land by express devise, for else none could have the Land not leas'd during the wives life.

Horton. verf. Wadham made a Lease for years, upon condition the Lessee
Horton. should not alien to any besides his Children. The Lessee de-
^{2 Jac. Cr. f. 74} viseth the term to Humfrey his son, after the death of his
^{& 75.} wife, and made one Marshall and another his Executors, and
died: The Lessor entered, as for breach of the Condition, sup-
posing

posing this a devise to the wife of the term by implication. The opinion of the Judges was, It was no devise by implication, but the Executors should have the term until the wife's death; but it was said, If it had been devise'd to his Executors after the death of his wife, there the wife must have it by implication, or none could have had it. But Popham denied that Case, because if the devise had been to the Executors after the wife's death, the Executors should, when the wife died, have had the term, as Legatees, but until her death they should have it as Executors generally, which by all opinions fully confirms the difference taken, That a devise shall not be good by implication, when the implication is not necessary; and in this Case all agreed the Case in 13 H. 7. to be good Law, because the implication there was necessary.

Edward Clatch being leis'd of two Messuages in Soccage Dyer 15 & 16 tenure, and having Issue a Son and two Daughters by three El. 4 330. by several Venters; His Son being dead in his life time, and leaving two Daughters, who were Heirs at Law to the Father, devise'd one of the Messuages to Alice his Daughter, and her Heirs for ever; and the other to Thomazine his Daughter, and her Heirs for ever, with limitation, That if Alice died without Issue, living Thomazine should then have Alice's part, to her and her Heirs; and if Thomazine died before the Age of Sixteen years, Alice should have her part in Fee also. And if both his said Daughters died without Issue of their bodies, then the Daughters of his Son should have the Messuages. The youngest daughter of the Testator died without Issue, having past her Age of sixteen years, It was resolv'd That the words in the Will, If his two Daughters died without Issue of their Bodies, did not create, by implication cross remainders in tail to the Testator's Daughters, whereby the eldest should take the part of the youngest, but her part should go to the Heirs at Law, according to the Limitation of the Will; and those words were but a designation of the time when the Heirs at Law should have the Messuages.

Note, That one of the Daughters dying without Issue, the Heir at Law by the Will had her part without staying until the other Daughter died without Issue.

1. From these Cases I first conclude, That only possible implication by a Will, shall not give the Land from the right Heir, but a necessary implication which excludes the right Heir, shall give it.

2. That

2. That the difference taken is not sound, That one shall not take, by implication of a Will, any Land where the same person hath other Land or Goods expressly devise'd by the same Will; for if the implication be necessary, the having of Land, or any other thing, by express devise, will not hinder another taking also by implication, as appears in the three Cases by me made use of, viz. 13 H. 7. 3 E. 6. 15 Eliz. cited out of Moor.

3. Whether any thing be given expressly by Will, or not, a possible Implication only shall not disinherit the Heir, where it may as well be intended that nothing was devise'd by implication, as that it was. But if any man think that be to material, in this Case the Daughters had respective Portions expressly devise'd them, viz. Six hundred pounds to each of them, and therefore shall not have the Land also by implication only possible to disinherit the right Heir.

For the second point, These words (My Will is, if it happen my Son George, Mary and Katherine my Daughters, to dye without Issue of their Bodies lawfully begotten, then all my Free-lands shall remain and be to my said Nephew William Rose and his Heirs for ever) are so far from importing a devise of the Land to the Son and Daughters for their lives, with respective Inheritances in tayl by any necessary implication, that both Grammatically, and to common intendment, they import only a designation and appointment of the time when the Land shall come to the Nephew, namely when George, Mary, and Katherine, happen to dye Issueless, and not before.

And where the words of a Will are of ambiguous and doubtful construction, they shall not be interpreted to the disinheriting of the right Heir, as is already shew'd.

This being clear, That there is no devise by this Will of the Land by implication in any kind to the Son and Daughters, it follows that Katherine, the surviving Daughter of the Testator, and Lessor of the Plaintiff, had no Title to enter and make the Lease to the Plaintiff Gardner; and then as to the Case in question before us, which is only, Whether the Defendants be culpable of Ejecting the Plaintiff? It will not be material whether,

The devise to the Nephew, William Rose, be void or not; and if not void, how and when he shall take by the devise, which may come in question perhaps hereafter.

4. But

But to that point ex abundante, and to make the Will not ineffectual in that point of the devise to the Nephew, if no Estate for lives, or other Estate, be created by this Will by implication to the Son and Daughters, it follows, That the Nephew can take nothing by way of Remainder, for the Remainder must depend upon some particular Estate, and be created the same time with the particular Estate. The Remainder is the residue of an Estate in Land depending upon a particular Estate, and created together with the same, and the Will creating no particular Estate, the consequent must be, That the Land was left to descend in Fee-Simple to the heir at law, without creating either particular Estate or Remainder upon it.

Sir Edward Coke hath a Case, but quotes no Authority for it; If Land be given to H. and his heirs, as long as B. hath heirs of his body, the Remainder over in Fee, the Remainder is void, being a Remainder after a Fee-Simple, though that Fee-Simple determines when no heirs are left of the body of B. Whether that case be law or not, I shall not now discuss; in regard that when such a case determines for want of Issue of the body of B. the Land returns to the Grantor and his heirs, as a kind of Reversion, and if there can be a Reversion of such Estate, I know not why a Remainder may not be granted of it, but for the former reason, this can be no Remainder, because no particular Estate is upon which it depends; and if the Lord Coke's Case be law, it is the stronger, that no Remainder is in this Case.

^a Co. 97.

^b 98. 2.

^a Sect. 11.

But without question, a Remainder cannot depend upon an absolute Fee-Simple by necessary reason; for when all a man hath of Estate, or any thing else, is given, or gone away, nothing remains but an absolute Fee-Simple, being given or gone out of a man, that being all, no other or further Estate can remain to be given or dispos'd, and therefore no Remainder can be of a pure Feesimple.

To this purpose is the Case of Hearne and Allen in this Court, 2 Car. 1. C. f. Richard Keen seis'd of a Messuage and Lands in Cheping-Norton, ^{57.} having Issue Thomas his Son, and Anne a Daughter by the same Venter, devise'd his Land to Thomas his Son, and his heirs for ever; and for want of heirs of Thomas, to Anne and her heirs, and died.

It became a Question, Whether Thomas had an Estate in Fee in Cap by this Will, for he could not dye without his Sister outlived him, who was to take according to the intent of the Devisor. Two Judges held it (and with reason) to be an Estate cap in Thomas, and the Remainder to the Daughter, who might be his heir, shew'd, That the Devise to him and his heirs could be intended only to be to him and the heirs of his body; But three other Judges held it to be a Devise in Fee, but all agreed, if the Remainder had been to a Stranger it had been void, for then Thomas (which is only to my purpose) had had an absolute Estate in Fee, after which there could be no Remainder, which is undoubted law.

The Case out of Coke's Littleton, and this Case, is the same to this purpose, That a Remainder cannot depend upon a Fee-simple; yet in another respect they much differ: Fee in this last Case, after an Estate in Fee devised to Thomas, and if he died without heir, the Remainder to a Stranger or Sister of the half blood, not only the Remainder was void as a Remainder, but no future devise could have been made of the Land by the Devisor; for if Thomas died without heir the Land escheated, and the Lord's Title would precede any future devise.

But in that Case of Sir Edward Coke, which he puts by way of Example, if it be put by way of Devise, That if Land be devised to H. and his heirs as long as B. hath heirs of his body the Remainder over, such later Devise will be good, though not as a Remainder, yet as an Executory Devise, because saying what remain'd to be devised when the Estate in Fee determin'd upon B. his heirs, no Issue of his Body.

And, as an Executory Devise, and not as a Remainder, I conceive the Nephew shall well take in the present Case. And the intention of the Testator, by his Will, will run as if he had said, I leave my Land to descend to my Son and his Heirs according to the Common Law, until he, and both my Daughters, shall happen to dye without Issue; And then I devise my Land to my Nephew *William Rose*, and his Heirs. Or as if he had said, my Son shall have all my Land, To have and to hold, to him and his Heirs, in Fee-simple, as long as any Heirs of the bodies of A, B. and C. shall be living, and for want of such Heirs I devise my Land to my Nephew *William Rose*, and his Heirs. The Nephew shall take as by a future and Executory Devise.

And

And there is no difference, whether such devise be limited upon the contingent of three Strangers dying without Heirs of their bodies, or upon the contingent of three of the Testator's own Children, dying without Heirs of their Bodies; for if a future devise may be upon any contingent, after a Fee-simple, it may as well be upon any other contingent, if it appear by the Will the Testator intended his Son and Heir should have his Land in Fee-simple.

This way of Executory devise after a Fee-simple of any nature, was in former Ages unknown, as appears by a Case in the Lord Dyer, 29 H. 8. f. 33. concerning a Devise to the Prior of St. Bartholomew in West-Smithfield, by the clear Opinion of Baldwin and Fitz-herbert, the greatest Lawyers of the Age.

But now nothing more ordinary. The Cases are for the most part remembred in Pell and Browns Case, that is, Dyer L. 124. Ed. Clatch his Case, f. 330. b. & 354. Wellock & Hamonds Case cited in Borastons Case, 3. Rep. Fulmerston & Stewards Case, &c.

I shall instance two Cases. The first is Haynsworths and Prettyes Case, Where a man left'd of Land in Soccage, having Issue two Sons and a Daughter, devis'd to his youngest Son and Daughter Twenty pounds apiece, to be paid by his eldest Son, and devis'd his Lands to his eldest Son and his Heirs, upon Condition if he paid not those Legacies, that his Land should be to his second Son and Daughter and their Heirs. The eldest Son fail'd of payment. After Argument upon a Special Verdict, It was resolv'd by the Court clearly, That the second Son and Daughter should have the Land.

1. For that the devise to his Son and his Heir in Fee, being Hill. 41. El. no other than what the Law gave him, was void. Cr. 833. a.
2. That it was a future devise to the second Son and Daughter, upon the contingent of the eldest Sons default of payment.

3. That it was no more in effect than if he had devis'd, That, if his eldest Son did not pay all Legacies, that his land should be to the Legatees, and there was no doubt in that Case, but the land, in default of payment, should vest in them.

Which Case, in the reason of law, differers not from the present Case, where the land is devis'd by devise future and Executory to the Nephew, upon a contingent to happen by the Testator's Son and Daughters having no issue.

This Objection was in some measure made by Doderige in *Pell and Browns Case*, and the Judges said there was no danger, because the Estate in Fee of Thomas did not determine by his dying without Heirs of his body generally, but by dying without Issue, living William; for if the land had been given to Thomas and his Heirs for ever, and if he died without Heirs of his body, then to William and to his Heirs; Thomas his Estate had been judg'd an Estate tail with the Remainder to William, and not a Fee, upon which no future or executory devise can be. So was it adjudg'd in *Foy and Hinds Case* 22 Jac. Cr. f. 695. & 6. and anciently 37 Ass. p. 18. 5 H. 5. f. 6. and to be within the reason of *Mildmay and Corbets Case of Perpetuities*.

But in *Pell and Browns Case* the Judges said it was more dangerous to destroy future devises, than to admit of such Perpetuities as could follow from them any way by determinable Fee-simples, which is true; for a Fee-simple, determinable upon a contingent, is a Fee-simple to all intents, but not so durable as absolute Fee-simples. And all Fee-simples are unequally durable, for one will escheat sooner than another by the failure of Heirs. An Estate of Fee-simple will determine in a Bastard with his wife, if he want Issue. An Estate to a man and his Heirs as long as John Sciles hath any Heir, which is no absolute Fee-simple, is doubtless as durable as the Estate in Fee which John Sciles hath to him and his Heirs, which is an absolute Fee-simple. Do I know any Law simply against a Perpetuity, but against Estates of Perpetuity, for every Fee-simple is a Perpetuity, but in the accident of Alienation, and Alienation is as incident to a Fee-simple determinable upon a contingent, as to any more absolute or more perdurable Fee-simple.

The Chief Justice, Justice *Archer*, and Justice *Wyde* for the Defendant, Justice *Tyrrell* for the Plaintiff.

Judgment for the Defendant.

Hill

George Ramsey, the fourth Son, was naturalized in the fourth Session of Parliament held at Westminster, begun by Prorogation, 19 Febr. 17 Jac. and after had Issue John primogenitum filium, Quodque idem Johannes had Issue John the now Defendant, primogenitum suum filium, but finds not where either of these were born, nor the death of George.

Nicholas the second Son, had Issue Patrick his only Son, born at Kingston, after the Union, 1 Maii, 1618. about 15 Jac. John the third Son, Earl of Holderness, seiz'd of the Mannors, Rectory, and Premises in the Declaration mentioned, with other the Mannors of Zouch and Taylboys, and divers other Lands in the County of Lincoln in Fee, by Indenture Tripartite between him on the first part, Sir William Cockayne and Martha his Daughter of the second part, &c. Dated the First of July, 22 Jac. Covenanted to levy a Fine before the Feast of St. Andrew next ensuing, to Sir William of all his said Lands, To the use of himself for life, then to the use of Martha, his intended Wife, for life, with remainder to the Heirs Males of his body begotten on her, Remainder to such his Heirs Females, Remainder to his right Heirs.

The Marriage was solemnized the Seven and twentieth of Sept. 22 Jac.

The Fine accordingly levied in the Common Pleas Octabis Michaelis, 22 Jac. of all the Lands and Premises among other in the Declaration mentioned.

The Earl, so seiz'd as aforesaid, with the Remainder over at Kingston aforesaid, died the Four and twentieth of January, 1 Car. 1. John died 2 Car. 1 Jan. 24

His Countess entred into the Premises in the Declaration mentioned, and receiv'd the Profits during her life.

After the Earls death a Commission issued, and an Inquisition taken at Southwark in Surrey the Nine and twentieth of February, 7 Car. 1.

By this Inquisition it is found the Earl died seiz'd of the Manor of Zouch and Taylboys, and divers Lands thereto belonging in Com. Lincoln, and of the Mannor of Westdeerham, and other Lands in Com. Norfolk, and of the Rectory of Kingston, and of the Advowson of the Vicaridge of Kingston in Com. Surrey, but no other the Lands in the Declaration are found in that Office. And then the Tenures of those Mannors are found, and that the Earl died without Heir. But it finds that the Earl so seiz'd levied a Fine of the Premises to Sir William Cockayne, per nomina Maneriorum de Zouch & Taylboys, & Rectoriæ de Kingston, cum omnibus Decimis dictæ Rectoriæ pertinentibus, and finds the uses ut supra, and so finds his dying without Heir, &c. It finds the Fine levied in terminis

The Questions upon this Record will be three.

1. Whether a Naturalization in Ireland will naturalize the ^{Marry. 376.} person in England? If it will not, all other Questions are out ^{377.} of the Case.

2. If it will, then whether by that Act for naturalizing the Antenati of Scotland, any his brothers, had title to inherit the Earl of Holderness in the lands in question? By reason of the Clause in the Act of Naturalization, that nothing therein contained should extend to avoid any Estate or Interest in any Lands or Hereditaments, which have already been found, and accrued to his Majesty, or to King James, for want of naturalization of any such person, and which shall and doth appear by Office already found and return'd and remaining of Record, or by any other matter of Record.

An Office was found, as appears by the Clerdict 7 Car. a-fore the Act, by which it is found he died seised of the Rectory of Kingston in Reversion, and of the Advowson of the Vicaridge, and died without Heir, and that the same escheated to the King; and if all the lands in question were held of the King, it being found he died without Heir, the proviso will save all to the King.

3. Whether Nicholas Ramsey, under whom the Plaintiffs claim, be the person who had title to the lands in question, if any had? Because,

1. The death of Robert the elder Brother, is not sufficiently found before the Act of Naturalization, for then he, and not Nicholas, was heir to John.

2. Because if Robert the elder were dead before, yet he left Issue three Daughters, who were naturalized as well as Nicholas by the Act, and are the heirs to the Earl, being the Issue of his elder Brother.

If Robert had died after the Irish Act made, this Clerdict had been as true as now it is: Therefore it is not sufficient to find him dead before the Act.

Do

Et

ral Tongue; why should not an Act of Law, making a man as if he had been born a Subject, work the same effect as his being born a Subject, which is an effect of law?

Post. 284.

1. The Reason is, That naturalization is but a fiction of Law, and can have effect but upon those consenting to that fiction; Therefore it hath the like effect as a mans Birth hath, where the Law-makers have power, but not in other places where they have not. Naturalizing in Ireland gives the same effect in Ireland as being born there, so in Scotland as being born there, but not in England, which consents not to the fiction of Ireland or Scotland, nor to any but her own.

Post. 285.

2. No fiction can make a natural Subject, for he is correlative to a natural Prince, and cannot have two natural Sovereigns (but may have one Sovereign, as a Queen Sovereign and her husband in two persons) no more than two natural Fathers, or two natural Brothers. But if a fiction could make a natural Subject, he hath two natural Princes, one where he was born, and the other where naturalized.

3. If one naturalized in Ireland should in law make him naturally born there, then one naturalized in Scotland, after the Union, should make him naturally born there, consequently inheritable in England, which is not contended.

4. A naturalized person in a Dominion belonging to England, is both the King's Subject when he is King of England, and inheritable in that his Dominion, when naturally

So the Antenati of Scotland are the King of England's Subjects when he is King of England, and inheritable in that Dominion of his, yet cannot inherit in England; and being his Subjects before, doth not make them lets his Subjects when King of England. Or if it did, Nicholas Ramsey, before he was naturalized in Ireland, and became there a Subject to the King of England, was a Subject in Scotland of the Kings.

There

There are four ways by which men born out of *England* may inherit in *England*, besides by the Statute of *Edward the Third, De Natis ultra Mare.*

1. If they be born in any Dominion of the Kings when he is actually King of England.

2. If they be made inheritable by Act of Parliament in England, as by naturalization there.

3. If they be born Subjects to a Prince, holding his Kingdom or Territories as Homager and Liegeman to the King of England, during the time of his being Homager. So the Welch were inher-
itable in England before 12 Ed. 1. though Subjects to the Prin-
ces of Wales, who were Homagers to the King of England. So

were the Scotch in Edward the first's time, during the King of Scotland's Homage to him, and to other Kings of England, as long as it continued. And that is the reason of the Case in 14 of Eliz. in the Lord Dyer, where a Scotch man being arraign'd for a Rape of a Girl under Seven years of Age, and praying his Tryal per medietatem Lingue, because he was a Scot born, it was denied him by the Opinion of the Judges of both Benches, for that, among other reasons, a Scot was never accounted an Alien here, but rather a Subject (So are the words of the Book) But they did not consider that the Homage was determined then, as it was construed after in Calvin's Case, when only the Postnati of Scotland were admitted inheritable in England. Upon the same ground one Magdulph, Subject to the King of Scots, appeal'd from his Judgment to Edward the First, ut Supe-
riori Domino Scotiz.

Calvin's Case,
f. 21. b.

Dyer 14 Eliz.
f. 304. pl. 51.

Pl. Parl. 12. E.
1. f. 152. & 157.

But this is to be understood where such Prince is Homager, Subjectionis, and not only Infeodationis; for another King may hold of the King of England an Island, or other Territory, by Tenure, and not be his Subject.

4. If the King of England enter with his Army hostilely the Territories of another Prince, and any be born within the places possessed by the King's Army, and consequently within his Protection, such person is a Subject born to the King of England, if from Parents Subjects, and not hostile

^s Eliz. Dyer **So** was it resolved by the Justices 5 Eliz. That one born in
^{£ 224. Pl. 29.} Tourney in France, and conquered by Henry the eighth, being
 a Bastard between persons that were of the King's liegeance,
 was enabled to purchase and implead within the Realm, and
 was the same as if a French man and French-woman should
 come into England, and have a Son born there. The like law
 if he had been born of French Parents in Tourney, for it was
 part of the Dominions belonging to England pro tempore, as
 Calice was.

Those under the King's Power, as King of England, in
 another Prince his Dominions, are under his Laws.

^{Flora. 1. 2. c. 3.} King Edward the first being at Paris 14 E. 1. one Ingelram
^{14 E. 1.} de Nogent stole Silver Dishes in the King's House there, and
 after dispute about his Tryal with the King of France and his
 Council, he was convicted before the Steward of the King of
 England's House, and executed, though the Felony was done in
 France, in Alieno Regno.

^{Flora. 1. 2. c. 3.} **So** Edmund de Murdak brought an Appeal in Gascoigne, co-
^{12 E. 1.} ram Seneschallo Hospitii Regis Angliae against one William de
 Lesnes of Robbery done to him, 12 E. 1. infra metas Hospitii
 Regis infra quas invenit ipsum. And the Defendant, non
 potuit appellum illud per exceptionem alterius Regni declina-
 re.

^{Post. 284.} 1. Regularly who once was an Alien to England, cannot be
 inheritable there, but by Act of Parliament, which is Common
 Experience.

But Ramsey was an Alien to England, being Antenatus of
 Scotland, and therefore cannot inherit here but by Act of Par-
 liament.

If it be said there is an Exception to that, viz. unless he
 be naturalized in Ireland; that Exception must be well prov'd,
 not suppos'd: for the Question being, whether one naturalized
 in Ireland do thereby become as a Native of England? must
 not be resolv'd by saying, That he doth become as a Native
 of England, otherwise it is prov'd only by begging the Que-
 stion.

2. **The** being no Alien in England belongs not to any made
 the King of England's Subject by Act of Law, when he is King
 of England, but such as are born so.

Natural legitimation respecteth actual Obedience to the ^{Calvins Case,}
Sovereign at the time of the birth, for the Antenati remain
Aliens, because they were born when there were several Kings
of the several Kingdoms; not because they are not by act of
law afterwards become Subjects to the King of England by the
Union of the Crowns: But he that is naturaliz'd in Scotland
or Ireland, is not a Subject born to the King of England, but
made by a subsequent Act in law.

3. And chiefly the manner of subjection of a Stranger naturaliz'd in Scotland or Ireland, doth exactly agree with that of
the Antenatus, and not of the Postnatus. ^{for,}

1. The Antenatus was another Prince his Subject, before he
was the King of Englands.

2. The Antenatus might have been an Enemy to England, by
a war between the several Kings before the Union.

So a Stranger naturalized in Scotland or Ireland, was the
natural Subject of some other Prince necessarily before he was
naturaliz'd, and then might have been an Enemy to the King of
England, by a war between his natural Sovereign and the King
of England, before he was naturalized.

But the Postnatus was never subject to any before he was
the King of Englands, nor ever in possibility of being an enemy
to England, both which are the properties of subjection in the
native English Subject, and is the reason why the Postnatus in
England is as the Natives of England.

No fiction of Law can make a man Natural Subject that ^{Act. 280.}
is not, for a Natural Subject and a Natural Prince are Relatives,
and if an Act of Naturalization should theredy make a man a na-
tural Subject, the same Subject would have two natural Sov-
ereigns, one when he was born, the other when naturalized,
which he can never have more than two Natural Fathers, or
two Natural Mothers, except the Sovereigns be subordinate,
the Inferior holding his Kingdom as Liege Vassal from the
Superior.

And perhaps in the Case of Severing the Kingdoms, as Sir ^{Calvins Case}
Edward Coke saith. ^{27.}

No; can an Act of Parliament in one place take away
the natural subjection due to another Prince for want of pow-
er.

Art. 280.

And the Law of England being, That Antenatus shall not inherit, because an Alien, without an Act of Parliament making him none: The fiction of an Act in another Kingdom, to which England never consented, shall not alter the law here, because he is made in Ireland as if born there.

If there were an Act of Parliament in England, That persons naturalized in Ireland or Scotland, should be no Aliens in England, no man thinks that thereby Scotland, or Ireland could naturalize a man in terminis in England. But a man naturalized there, would by consequent be naturalized in England, because the law of England did warrant that consequent.

But to say, That a man naturalized in Ireland is not directly naturalized in England, but by consequent, when the Question is, Whether one naturalized in Ireland be thereby naturalized in England? is to beg for a proof that which is the question.

Therefore it must be first proved, That there is a Law of England to warrant that consequent.

Inconveniences.

Art. 281.

The Law of England is, That no Alien can be naturalized but by Act of Parliament, with the assent of the whole Nation.

1. Now if this naturalization in Ireland should be effectual for England, then a whole Nation should become Natives in England, without Act of Parliament of what Country Religion, or Manners soever they be, by an Act of Ireland.

2. If the Parliament of England should refuse to naturalize a number of men, or Nation, as dangerous or incommodious to the Kingdom, yet they might be naturalized, whether the Houses of Parliament would or not, by an Act of Ireland.

3. By this invention the King may naturalize in England without an Act of Parliament, as well as he may Denizen; for if the Parliament of Ireland enact, That the King, by Letters Patents, shall naturalize in Ireland, then they so naturalized in Ireland by Patent, will be naturalized in England by consequent, so they may enact the Deputy or Council of Ireland to naturalize.

4. If an Alien hath Issue an Alien Son, and the Father be denizen'd in England, and after hath a Son born in England, the Law hath been taken, That the youngest Son shall inherit the Fathers Land. So is Sir Edward Coke Litt. f. 8.a. Co. Litt. f. 8.a. Do. & Stud. 1.1. and other Books; yet if the elder be naturaliz'd in Ireland, the Cr. 17 Jac. f. Estate which the youngest hath, by the Law of England, will be § 39. Godfrey & Dixons C. plucked from him.

Paving thus opened the Inconveniences consequent to this Irish naturalization, the next is, That Judges must judge according as the Law is, not as it ought to be. But then the Premisses must be clear out of the established Law, and the Conclusion well deduc'd before great Inconveniences be admitted for Law. But if Inconveniences necessarily follow out of the Law, only the Parliament can cure them.

Anno. 37-38.

Devant. 38.

1. I shall begin with the admitted Doctrine of Calvin's Case. By that Case, He that is born a subject of the King of England in another Dominion than England, is no Alien in England. So the Scots, born when the King of Scots was King of England, are no Aliens; those born before in Scotland are. Therefore Nicholas Ramsey, who is not born the King's Subject of Ireland, must be an Alien in England, whose Law, by the Rule of that Case, makes only Subjects born, and not made of another Dominion, not to be Aliens in England.

2. It is agreed to my hand, That an Alien naturalized at this day in Scotland, remains an Alien in England notwithstanding.

3. By the Doctrine of Calvin's Case, a natural born Subject to the King's person of a Foreign Dominion, is not privileged in England from being an Alien, else the Antenati of Scotland were privileged for they are natural born Subjects to the King's person, as well as the Postnati.

4. It stands not with the Resolution of that Case, That the natural born Subjects of the Dominions belonging to the Crown of England (qua such) should be no Aliens in England, which was the principal matter to have been discuss'd, but was not, in Calvin's Case, and chiefly concerns the point in question.

The time of his birth is chiefly to be considered, for he cannot be a Subject born of one Kingdom, that was born under the Liegeance of a King of another Kingdom, albeit afterwards one Kingdom descend to the King of the other.

Therefore Ramsey, being not under the Liegeance of the King of England at the time of his birth, must still continue an Alien, though he were naturalized in Ireland.

Notwithstanding all this, it may be urg'd,

A person naturalized in England is the same as if he had been born in England, and a person naturalized in Ireland is the same as if he had been born in Ireland.

But a person born in Ireland is the same as if he had been Obj. 1.
born, or naturalized in England.

Therefore a person naturalized in Ireland, is the same as if he had been born or naturalized in England. This seems subtle and concluding.

For Answer, I say, That the same Syllogism may be made Answ. of a person naturalized in Scotland after the Union, viz.

A person naturalized in England, is the same with a person born in England; and a person naturalized in Scotland, after the Union, is the same with a person born in Scotland after the Union.

But a person born in Scotland, after the Union, is the same with a person born or naturalized in England.

Therefore a person naturalized in Scotland, after the Union, is the same with a person born or naturalized in England.

Yet it is agreed, That a person naturalized in Scotland, since the Union, is no other than an Alien in England; Therefore the same Conclusion should be made of one naturalized in Ireland.

To differ these two Cases, it may be said, That the naturalizing of a person in Scotland can never appear to England, because we canot write to Scotland to certify the Act of Naturalizing, as we may to Ireland, out of the Chancery, and as was done in the present Case in question, as by the Record appears.

This is a difference, but not to the purpose, and then it is the same as no difference; For I will ask by way of Supposition:

Admit an Act of Parliament were made in England for clearing all Questions of this kind,

That all persons inheritable, in any Dominion whatsoever, whereof the King of England was King, whether naturalized, or Subjects born, should be no Aliens in England, it were then evident by the Law, That a naturalized Subject of Scotland were no Alien in England, yet the same Question would then remain as now both, How he should appear to be naturalized? because the Chancery could not write to Scotland, as it can to Ireland, to certify the Act of Naturalizing.

Answ. 1.

The fallacy of the Syllogism consists in this. It is true, that a person naturalized in Ireland, is the same with a person born in Ireland, that is by the Law of Ireland. But when you assume, That a person born in Ireland is the same with a person born or naturalized in England, that is not by the Law of Ireland, but by the Law of England. And then the Syllogism will take four terms in it, and conclude nothing.

Answ. 2. 3.

But to answer the difficulty taken, there are many things whereof the Kings Courts sometimes ought to be certified, which cannot be certified by Certiorari, or any other ordinary Ullet.

¶ 3. f. 2. b.
An Act of Parliament of Scotland may be evidence as a Sentence of Divorce or Deprivation, and Foreign upon the Treaty or Conclusion made, that therefore they must address themselves to the King to have that certified.

In the Case of the Lord Beaumont, 42 E. 3. a Question was, Whether one born in Ross in Scotland were within the Kings Liegeance? because part of Scotland then was, and part not, in his Liegeance, the Court knew not how to proceed until Thorpe gave this Rule; That doubtless the King had a Roll, what parts of Scotland were in his Liegeance, what not, and Foreign upon the Treaty or Conclusion made, that therefore they must address themselves to the King to have that certified. The like may now happen of Virginia, Surinam, or other Places, part of which are in the Kings Liegeance, part not. So the King hath, or may have, Rolls of all naturalized Subjects; and upon petition to him, where the occasions require it, may cause the matter in his name to be certified. The like may happen upon emergent Questions upon Leagues or Treaties, to which there is no common access, but by the Kings permission.

¶ 4. f. 957.

For illustration, a straigh't Case is no good as a Case in fact. Suppose a Law in Ireland, like that of 5. of the Queen, That no man should set up Shop in Dublin, unless he had serv'd as an Apprentice to the Trade for Seven years; and suppose a Law in England, That whosoever had serv'd Seven years as an Apprentice in Dublin, might set up Shop in London. If by a particular Act of Parliament in Ireland J. S. be enabled to set up Shop in Dublin, as if he had serv'd an Apprentiship for Seven years, by this fiction he is enabled in Ireland to set up, but no

And by the Case in 2 R. 3. f. 12. all the Judges there agree, 2 R. 3. f. 12.
assembled in the Exchequer Chamber, That a Writ of Error lay Post. 401.
to reverse Judgments in Ireland, and that Ireland was subject
as Calais, Gascoigne, and Guyen, who were therefore subject as
Ireland: And therefore a Writ of Error would there lie as in
Ireland.

Another Objection, subtle enough, is, That if natura. Object. 3.
lizing in Ireland, which makes a man as born there, shall not
make him likewise as born (that is no Alien) in England, That
then naturalizing in England should not make a man no Alien
in Ireland (especially without naming Ireland) and the same
may be said, That one denizen'd in England should not be so in
Ireland.

The Inference is not right in form, nor true. The An- Answ.
swer is, The people of England now do, and always did, con-
sist of Native Persons, Naturaliz'd Persons, and Denizen'd Per-
sons; and no people, of what confluence soever they be, can be
Aliens to that they have conquer'd by Arms, or otherwise sub-
jected to themselves, (for it is a contradiction to be a stranger
to that which is a mans own, and against common reason and
publique practice).

Therefore neither Natives or Persons Naturaliz'd or denizen'd
of England, or their Successors, can ever be Aliens in Ireland,
which they conquer'd and subjected. And though this is De
Jure Belli & Gentium, observe what is said, and truly, by Sir
Edward Coke in Calvin's Case, in pursuance of other things said
concerning Ireland.

In the Conquest of a Christian Kingdom, as well those that
served in Warr at the Conquest, as those that remain'd at home
for the Safety and Peace of their Country, and other the Kings
Subjects, as well Antenati as Postnati, are capable of Lands in
the Kingdom or Country conquer'd, and may maintain any real
Action, and have the like Priviledges there as they may have in
England.

Another Objection hath been, That if a person naturaliz'd in Object. 4.
Ireland, and so the Kings natural Subject, shall be an Alien here,
then if such person commit Treason beyond the Seas, where no
local Liegeance is to the King, he cannot be tryed here for 26 H. 8 c. 13.
Treason, contra ligantia suæ debitum, by the Statute of 26 H. 8. 33 H. 8. c. 23.
or 35 H. 8. or any other Statute to that purpose. 35 H. 8. c. 2.
2 Vent. 314.

Treason by
an Irish man in Ireland or elsewhere, may be tryed in England by those Statutes. 33 El. Anjeron
Rep. f. 262. b. Orwicks Case. Calvins Case, f. 23. a

Laws made in the Parliament of *England* binding *Ireland*.

A Law concerning the Homage of Pareeners, called Statutum 14 H. 3.
Hiberniae.

A Statute at Nottingham, called Ordinatio pro Statu Hiberniae. 17 E. 1.

Laws for *Ireland* made by E. 3. per advisamentum Concilii nostri in ultimo Parliamento nostro apud Westm. tento. Pat. Rel. 5 E. 3.
pars 1. m. 29.
pla. Parl. 5 86.

An Act that no Arcbischop, Bishop, or Prior should be chosen, 4 H. 5. c. 6.
who were Irish, nor come to Parliaments with Irish Attendants.

The late Acts made in 17 Car. 1. and many others.

The Resolution of all the Judges in the Exchequer Chamber, 17 Car. 1.
That they were bound by, and subject to the Laws of England, 25 H. 8. c. 20
as those of Calais, Gascoign, and Guien, in the Case of the
Merchants of Waterford, for shipping Staple Goods for Sluce in
Flanders, to which they pleaded the Kings Licence and Dispensation,
not pretending freedom from the Statute of 2 H. 6. c. 4.
whereupon they were questioned.

Ireland receiv'd the Laws of England by the Charters and Commands of H. 2. King John, H. 3. &c.

I know no Opinion that Ireland, receiv'd the Laws of England by Act of Parliament of England, nor had it been to purpose, having also a Parliament of their own, that might change them.

Sir Edward Coke is of Opinion, That they received them Cok. Litt. 6.
by a Parliament of Ireland, in several Books, in the time of 14 H. b.
King John, and grounds his Opinion upon the words of sebe- Part. 12 H. 3.
ra! Patents of H. 3. which mention King John to have gone into Post. 298.
Ireland, and carried with him discretos viros quorum communi

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de divisis faciend. inter duas villas exceptis Baron. Et ideo vobis mandamus, & firmiter præcipimus, quod hæc ita fieri & firmiter teneri per totam potestatem nostram *Hibernie* faciatis. Teste meipso apud *Westmonasterium* secundo die *Novembris.* 17.

Claus. 7. Johannis.

Rex M. filio *Henr.* Justiciar. *Hibernie*, &c. Sciatis quod *Devoniam* exposuit nobis ex parte Regis *Connacia*, quod idem Rex exigit tenere de nobis tertiam partem terræ de *Connacia* per C. Mareas per Annum, sibi & hæredibus suis nomine Baroniam.

Pat. 6. Johan. m. 6. n. 17.

Rex, &c. Justic. Baronibus, Militibus, & omnibus fidelibus suis *Hibern.* &c. Sciatis quod dedimus potestatem Justic. nostr' *Hibernie*, quod brevia sua currant per totam terram nostram, & potestatem nostram *Hibernie*, scilicet breve de Recto de feodo Dimidii Mil. & infra, & de morte Antecessor. & similiter de feod. dimid. Mil. & infra. Et erit terminus de morte Antecessor. post transfretationem *Henr.* Regis patris nostri de *Hibern.* in *Angl.* Et breve de Nova *Disseisina* cuius erit terminus post primam Coronationem nostram apud *Cant.* Et breve de *Fugit.* & *Nativis*, & ejus erit terminus post captionem *Dublin.* Et breve de divisis faciend. inter duas villas, except. Baron. Et ideo vobis Mandamus & firmiter præcipimus quod hæc ita fieri & firmiter teneri per totam potestatem nostram *Hibernie* faciatis. Teste meipso apud *Westmonast.* ji. die *Novembri.*

Claus. 12 H. 3. m. 8,

Rex dilecto & fidei suo *Richardo de Burgo* Justic. suo *Hibern.* De legibus & consuetudinibus obser-
vandis in Hibernia. salutem, Mandamus vobis firmiter præcipientes quatenus certo die & loco faciatis venir. coram vobis Archiepiscopos, Episcopos, Abbates, Piores, Comites, & Barones, Milites & Libere tenentes & Ballivos singulorum Comitatuum, & coram eis publice legi faciatis *Chartam Domini J.* Regis patris nostri cui Pat. 6. Joh. n. 17. Dat. apud Westm. 2 die Novemb. Sigillum suum appensum est, quam fieri fecit & jurari a Magnatis *Hibern.* de Legibus & consuetudinibus *Angl.* observandis in *Novemb.* *Hibernia.* Et præcipiat eis ex parte nostra quod Leges illas &

Q q 2 con-

Clause 3. H. 3. m. 8. part 2.

The King writes singly to *Nicholas*, Son of *Leonard* Steward of *Meth*, and to *Nicholas de Verden*, and to *Walter Purcell* Steward of *Lagenia*, and to *Thomas* the son of *Adam*, and to the King of *Connage*, and to *Richard de Burgh*, and to *J. Saint John* Treasurer, and to the other Barons of the *Exchequer* of *Dublin*, That they be intendant and answerable to *H. Lord Arch-bishop of Dublin*, as to the Lord the King's Keeper and Bailif of the Kingdom of *Ireland*, as the King had writ concerning the same matter to *G. de Mariscis*, Justice of *Ireland*.

Clause 5. H. 3. m. 14.

The King writes to his Justice of *Ireland*, That whereas there is but a single Justice itinerant in *Ireland*, which is said to be dissonant from the more approved custom in *England*, for Reasons there specified, two more Justices should be associated to him, the one a Knight, the other a Clerk, and to make their Circuits together, according to the Custom of the Kingdom of *England*. Witness, &c.

The Close Roll. 5 H. 3. m. 6, Dorso.

The King makes a Recital, That though he had covenanted with *Geoffrey de Mariscis*, That all Fines, and other Profits of *Ireland*, should be paid unto the Treasurer, and to other Bailiffs of the Kings *Exchequer* of *Dublin*, yet he receiv'd all in his own Chamber, and therefore is removed by the King from his Office: Whereupon the King, by advise of his Council of *England*, establisheth. that *H. Arch-bishop of Ireland* be Keeper of that Land, till further order. And writes to *Thomas*, the son of *Anibony*, to be answerable and intendant to him. After the same manner it is written to sundry Irish Kings and Nobles there specially nominated.

Clause

If any Union, other than that of a Provincial Government under England had been, Ireland had made no Laws mox than Wales; but England had made them for Ireland, as it doth for Wales.

As for the Judgment.

One of my Brothers made a Question, Whether George Obj. Ramsey, the younger Brother, inheriting John Earl of Holdernes, before the naturalization of Nicholas, whether Nicholas, as elder Brother, being naturalized, should have it from him? Doubtless he should, if his Naturalizing were good. He saith the Plaintiff cannot have Judgment, because a third person, by this Verdict, hath the Title.

If a Title appear for the King, the Court, ex Officio, ought to give Judgment for him, though no party. But if a man Answ. have a prior Possession, and another enters upon him without Title, I conceive the priority of Possession is a good Title against such an Entry equally when a Title appears for a third, that is no party, as if no Title appear'd for a third.

But who is this third party? For any thing appears in the Verdict, George Ramsey died before the Earl. 2. It appears not that his Son John, or the Defendant, his Grand-child, were born within the King's Liegeance. Patient appears to be born at Kingston, and so the Daughters of Robert by the Verdict.

The Acts of Ireland except all Land whereof Office was found before the Act to entitle the King, but that is in Ireland, for the Act extends not to England. If Nicholas have Title, it is by the Law of England, as a consequent of Naturalization.

So it may be for the Act of 7 Jac. cap. 2. he that is Naturalized in England, since the Act, must receive the Sacrament; but if no Alien, by consequent then he must no more receive the Sacrament than a Postnatus of Scotland.

Ireland is a distinct Kingdom from England, and therefore Obj. cannot make any Law Obligative to England.

Mr. Murray his Hs. a. b. 3 being greatest
of the bran app. to have the only title for
King to much of the land as were held
of the King and the d. in p. lands to the
rest as Escheat

Laws of England, unnamed until 27 H. 8. no more than Ireland now is.

Ireland in nothing differs from it, but in having a Parliament, Gratia Regis, subject to the Parliament of England, it might have had so, if the King pleas'd; but it was annex'd to England. None doubts Ireland, as conquer'd, as it; and as much subject to the Parliament of England, if it please.

The Court was divided, viz. The Chief Justice and *Tyrrell* for the Plaintiff. *Wyld* and *Archer* for the Defendant.



R r

Trin.

Trin. 25 Car. II. C. B. Rot. 1488.

Thomas Hill and Sarah his Wife are Plaintiffs.
Thomas Good Surrogat of Sir Timothy Baldwyn
Knight, Doctor of Laws, and Official of the
Reverend Father in God, Herbert Bishop of He-
reford is Defendant, *In a Prohibition.*

The Plaintiffs, who prosecute as well for the King, as themselves, set forth, That all Pleas and Civil Transactions, and the Exposition and Construction of all Statutes and all Penalties for the breach of them pertain only to the King and his Crown.

Then set forth the time of making the Act of 32 H. 8. c. 38. and the Act it self at large, and that thereby it was enacted, That from the time limited by the Act, no Reservation or Prohibition (Gods Law excepted) should trouble or impeach any marriage without the Levitical Degrees. And that no person shall be admitted after the time limited by the Act, in any the Spiritual Courts within this Kingdom, to any Proceeds, Plea, or Allegation contrary to the Act.

They set forth, That after the making of the said Act, and the time thereby limited, the Plaintiffs being lawful persons to contract marriage, and not prohibited by Gods Law, and being persons without the Levitical Degrees, the Twentieth day of September, in the Four and twentieth year of the King, at Lemster in the County of Hereford, contracted matrimony in the face of the Church, and the same consummated and solemnized, with carnal knowledge and fruit of Children, at Lemster aforesaid.

That by reason thereof the said Marriage is good and lawful, and ought not to be null'd in Court Christian.

Act. 247.

That

That notwithstanding, the Defendant, præmissorum non ignorans, fraudulently intending to grieve and oppress the Plaintiffs, unduly draws them into question before him in the Court Christian for an unlawful marriage, as made within the Degrees prohibited by Gods Laws, and there falso caute & subdole libelling, and supposing, that whereas by the Laws and Canons Ecclesiastical of this Kingdom, it is ordained, That none should contract matrimony within the Degrees prohibited by Gods Law, and expressed in a certain Table set forth by Publique Authority, ^{Act. 24.} Anno 1563. and that all marriages, so contracted, should be esteemed incestuous and unlawful, and therefore should be dissolved, as void, from the beginning.

And also, That whereas by a certain Act of Parliament made and published in the Eight and twentieth year of King *Henry* the Eighth, It is enacted, That no person or persons, subject or residing within the Realm of *England*, or within the Kings Dominions, should marry within the Degrees recited in the said Act, upon any pretence whatsoever: And

That whereas the said Thomas Hill had taken to wife one Elizabeth Clark, and for several years cohabited with her, as man and wife, and had carnal knowledge of her,

He the said Thomas, notwithstanding, after the death of the said Elizabeth, had married with, and took to wife the said Sarah, being the natural and lawful Sister of the said Elizabeth, against the form of the said last mentioned Statute, and then the said Thomas and Sarah had caus'd unjustly to appear before him in Court Christian, to Answer touching the Premisses, although the said marriage be lawful, and according to Gods Law, and without the Levitical Degrees. And

That although the Plaintiffs have, for their discharge in the said Court Christian, pleaded the said first recited Act, yet the Defendant refuseth to admit the same, but proceeds against them, as for an incestuous marriage, against the form of the Statute.

And that notwithstanding he was serv'd with the Kings Writ of Prohibition to desist in that behalf, in contempt of the King, and to the Plaintiffs damage of One hundred pounds.

The Defendant denies any prosecution of the Plaintiffs, contrary to the Kings Writ of Prohibition, and thereupon Issue is joyn'd and demurrs upon the matter of the Declaration, and pays a Consultation, and the Plaintiffs joyn in Demurrer.

Therefore taking it for granted, That the Temporal Courts can prohibit the impeaching of marriages without the Levitical Degrees, by the Statute of 32 H. 8. (for before no Prohibition was ever granted in that kind :) The Question is,

Whether the marriage of the Husband with his Wifes Sister, after the Wifes death, be such a marriage as by the Act of 32. the Temporal Courts may prohibit the impeaching or drawing it into question in the Spiritual Courts, in order to a Divorce or separation of the parties ? And I conceive they cannot for these Reasons,

1. I affirm this marriage to be expressly prohibited within the Eighteenth of Leviticus, and then it must be within the Levitical Degrees.

2. If it were not so prohibited, yet it is not a marriage without the Levitical Degrees, but within them, and therefore no Prohibition will lie for impeaching it ; for marriages not to be impeached must be without the Degrees, and for that some marriages within the Degrees may be lawful.

3. That if this marriage be without the Levitical Degrees, Post. 219. yet it is a marriage prohibited by Gods Law, and therefore to be impeached, notwithstanding the Statute of 32. whose words are, No marriage (Gods Law excepted) shall be impeached without the Levitical Degrees.

As to the first,

1. When a Law is given to any people, it is necessary that it be conceiv'd and publish'd in words which may be understood, Devane. 228. so; without that the Law cannot be obey'd ; and a Law that cannot be obey'd, is no Law.

2. The meaning of words in any Law are to be known, &c. Devane. 169. either from their use and signification, according to common acceptance before the Law made, or from some Law or Institution declaring their signification.

3. The Interdicts of marriage and carnal knowledge in the Levitical Law were directed formally to the men, not to the women, who are interdicted but by consequent ; for marriage and carnal knowledge being a reciprocal Act, and impossible to be done by one party, it follows that the woman being interdicted to the man, the man must also consequently be interdicted to the woman, for a man cannot marry a woman, and she not marry him.

4. The

The first and most general Levitical prohibition in that kind, is in the same words as this Law, prohibiting being defiled for the dead, but for a mans kin, that is near unto him.

None of you shall approach to any that is near of kin to him, to uncover their nakedness. And after Instances are given of the persons comprehended under those words, Near of kin, as is done in the other Law concerning the dead.

As in the father, the brother, the son whose nakedness appears to consist and terminate in their Wives: For a man cannot otherwise uncover the nakedness of a man but in his wife, which is the mans nakedness, as appears in the Text; and those are three of the persons comprehended under the words near of kin.

The nakedness of thy father shalt thou not uncover, which is Lev. 18. v. 7. explained as before in the next verse, ----. The nakedness of thy Fathers Wife shalt thou not uncover: It is v. 8. thy Fathers nakedness.

Thou shalt not uncover the nakedness of thy Daughter in law, v. 15. she is thy sons Wife.

The nakedness of thy Brothers Wife shalt thou not uncover; it v. 16. is thy Brothers nakedness.

Which is the same as to say, Thy Father, thy Brother, thy Son, are thy near of kin, therefore thou shalt not uncover their nakedness by uncovering the nakedness of their Wives.

Then as to the nakedness of the Females terminating in their own persons.

The nakedness of thy Mother shalt thou not uncover, she is thy v. 7. Mother. ---- The nakedness of thy Sister, the Daughter of thy v. 9. Father, or the Daughter of thy Mother, thou shall not uncover: which is to say, Thy Mother and Sister are thy near of kin, therefore shalt thou not uncover their nakedness. So express Instances are made in five of the six sorts of persons declared to be near of kin.

But no Instance is made in the Daughter, though she be as Post. 323. immediately as the Son near of kin to the Father, and eminent- ly comprehended under that Law of not approaching to a mans near of kin, and by all both reason and exposition within it; which made Sir Edward Coke, by mistake in his Table of Pro- Cok. Inst. 1. f. hibited Marriages in his Comment upon the Statute of 32 H.8. to 683. set down the Daughter as nominally prohibited by the Eighteenth of Leviticus, and then in the Margin to say, those Degrees are truly

Whence also it appears, That the Instances given in this second Rule drawn out of Leviticus, are not the Law it self, nor comprehend the extent of it, but are examples only of another, or second degree of kindred, comprehended under the general Law of not approaching to those near of kin, and which are particularly specified by the Karait Rabbies.

That all persons near of kin strictly, to any the six persons first interdicted, are likewise interdicted by that Law : None shall approach to any near of kin to him to uncover their nakedness, with in the meaning of the words, near of kin, is further prob'd by these Reasons.

1. When the Law hath denominated the Relations to be accounted near of kin ; (as is done in this case) none comprised under that denomination can be more or less near of kin than others so denominated. As when the Law denominates a man an Attorney, Serjeant, or the like, no Attorney is more or less an Attorney, and no Serjeant more or less a Serjeant, than any other Attorney or Serjeant. And so is it in all orders of men of the same denomination.

Therefore it appearing by the Law to be the reason of interdicting a person, because near of kin to a mans father or mother, and none of those six Relations being more or less near of kin than the other, the nearness of kin to any of them is as much reason of interdicting, as the nearness of kin to the Father or Mother, or any other of them instanced in.

Another reason is, because the Law forbidding the approach to any near of kin, forbids in that expression the near of kin to any of the six persons strictly denominated near of kin, as well as those six persons themselves : For in Leviticus a man is interdicted his wifes daughter, and his wifes sons daughter, and her daughters daughter, because they are his wifes near kinswomen, whereas her daughter only is the near kinswoman to the wife in the strictest sense, and the other but near of kin to her near of kin, that is, to her daughter ; yet all of them are said to be the wifes near kinswomen. So, Thou shalt not uncover the nakedness of thy mothers or fathers sister, for he uncovereth his near kin : before they were said to be the near kin to the mother and father, and here to be the sons near kin.

Lev. 20. 19.

From the same Verse they deduce a fourth Rule, That the Husband is prohibited the near of kin to his wives near of kin, as before in the prohibitions of consanguinity; for he is literally prohibited the daughter of his wives son, and her daughters daughter, and by necessary inference also his wives grand mother by father and mother, who are the near of kin to his wives daughter and her mother, who are his wives near of kin, which they thus strongly prove.

A man is forbidden to take a woman and her sons daughter or her daughters daughter.

Therefore if a man marry his wives grand-mother, he hath taken a woman and her sons daughter, or her daughters daughter, which is expressly forbid.

And in these are express instances given of prohibiting the near of kin to his wives near of kin, and are also termed his wives near kinswomen as well as those which strictly are so.

By the same reason all others near of kin to his wives father, brother or sister, are prohibited the husband, as well as those near of kin to her mother, her daughter, or son, and are equally in terminis within the words, his wives near kinswomen, of which sox they number Sixteen, the same with those prohibited in the second Rule for Consanguinity.

And it is observable, That the Parochial Matrimonial Table, An. 245ⁱ in use in England, agrees in its prohibitions of marriages, which are Thirty in number, for Consanguinity and Affinity, with the Levitical Prohibitions, according to the Doctrine of the Karaic Rabbins in the four former Rules.

But the Karaits prohibit Eleven Degrees of Affinity (much of the same nature) more than the Table doth in their two last Rules; that is,

The wives fathers wife,
Her brothers wife,
Her sons wife,
Her Grand-fathers wife by the father,
Her Grand-fathers wife by the mother,
Her fathers brothers wife,
Her mothers brothers wife,
Her brothers sons wife,
Her sisters sons wife,
Her sons sons wife,
Her daughters sons wife.

That clear'd, I reason thus, either marrying the wives. If
she, after the wives death, was lawful when the Canon was
made, or unlawful, for it relates to an offence done qui duxit,
not to a new made offence. If lawful, why then was any pu-
nishment (namely exclusion from the Clergy) inflicted for a
lawful Act? If it were unlawful in the Apostles time, how is
it become now lawful?

It is true, as the Learned Grotius observes on this Subject,
A marriage may be unlawful in many respects, and yet the mar-
riage stand good, and the vinculum matrimonii not dissolv'd, but
punishable some other ways, if made unlawful by Human Au-
thority.

Grot. de Jure
Bell. l. 2. c. 5.
Sec. 14.

But this Precept of the Apostles cannot be said of Human
Authority only, nor a new Institution, as is already noted; nor
was there any Divorce for Incest among the Jews, as is no-
ted after, but was always among the Christians in Christian
States.

2. In that time the Apostles and Primitive Christian Church
had no Jurisdiction or Power of Legal Divorce, Separation, and
Bastarding the Issue, how incestuous soever the marriage were,
for those were Acts of Jurisdiction and Coercion, and could not
be done but by the power of Laws, to which the parties were
locally subject. But the Apostles and Church power was only
to forbid them communion with the rest of their brethren Chris-
tians, and to deny the Offenders such things as were in their
power, namely, to be of the Clergy, as was done by this Ca-
non.

This appears by St. Paul, 1 Cor. 5. It is reported there is ^{1 Cor. 5. 1.}
fornication among you, and such fornication as is not so much as
named among the Gentiles, That one should have his Fathers wife;
which was an Incest of the highest degree, although denoted by
the word *πορνεία*.

Yet St. Paul could do no more but direct the Corinthians
from Communion with that man, and to put away from among
them that wicked person: He could neither null his marriage,
nor illegitimate his Issue, if he had any, nor put the Offender
to death, according to the Mosaical Law, for these are effects of
the Civil Power; and among the Hebrews no Divorce was for
Incest, but the marriage was void, and the Incest punish'd, as in
persons unmarried.

Seld. Ux. E-
braica, l. 1. c.
12. f. 87. 89.

By a Canon of another very ancient Provincial Council, called Concilium Eliberinum, under Pope Silvester, Three hundred and fourteen years after Christ, and before the Council of Nide, by the Sixteenth Canon of that Council. — Si quis post obitum Grot. 1. 2. c. 5.
p. 256. Sect. 14. Uxoris ~~et~~ sororem ejus dixerit per quisquecumque a communione abstineat.

By this so ancient Council, marrying the wives sister was accounted unlawful, but for the same reasons as before; they could punish it no otherwise than by ways in the power of the Church, which was to hinder the Offender from Communion for five years.

And in this Council they followed the exposition of the Karaites also concerning marriages, and not of the Talmudists; for it is rational to conceive, that Canons then forbidding any sort of marriage, proceeded from an arbitrary power, assumed by those who made them, as Law-makers, to which they could no way pretend, but because it was unlawful by the Principles and Persuasion of all Christian Believers.

*Vide for these Rules Selden's Uxor Ebraica;
L. 1. cap. 4, 5.*

By the first Rule is interdicted to a man his near of Kin. By the Matrimonial Table of England interdicted

The fathers wife	The fathers wife or Step-mother
The mother	f. 11
The brothers wife	f. 16
The sister	f. 18
The sons wife	f. 16
The daughter	f. 15

By

By the fourth *Rule* is interdicted to a man the
near of Kin to his *wives near of Kin*

A woman and her grand-mother by the mother	A woman and her grand-mother by the mother	f. 3
A woman and her grand-mother by the father	A woman and her grand-mother by the father	f. 3
A woman and her fathers bro- thers wife	O. A woman and her fathers brothers wife	f. 6
A woman and her mothers bro- thers wife	O. A woman and her mothers brothers wife	
A woman and her brothers sons wife	Omitted.	
A woman and her brothers daughter	A woman and her brothers daughter	f. 29
A woman and her sisters daugh- ter	A woman and her sisters daugh- ter	f. 30
A woman and her sisters sons wife	Omitted.	
A woman and her sons sons wife	Omitted.	
A woman and her sons daughter	A woman and her sons daugh- ter	f. 23
A woman and her daughters sons wife	Omitted.	
A woman and her daughters daughter	A woman and her daughters daughter	f. 24
A woman and her fathers sister	A woman and her fathers sister	
A woman and her mothers sister	A woman and her mothers sister	
A woman and her grand-fathers wife by the father	Omitted.	
A woman and her grand-fathers wife by the mother	Omitted.	

These last four Degrees are not mentioned under the fourth Rule by Mr. Selden, but referred to by the words, & reliquis quæ supersunt ex iis quæ in regula secunda propinquorum sunt propinquæ; but the two first of these last four are forbid in our Matrimonial Table, not the two last, as several others of the

C t same

the Table, the Grand-fathers wife, the Grand-mother, and the wives Grandmother, make but three degrees; But in the enumeration of the Karaits, the Grandfathers wife by the father, the Grand-fathers wife by the mother, the Grand-mother by the father, and the Grand-mother by the mother, the wives Grandmother by the father, and the wives Grand-mother by the mother, are severally enumerated, and so make Six persons, Three more than are enumerated in the Table, and so the Numbers agree.

The second Assertion.

And as to the second Assertion, That admitting this marriage is not within the Levitical Prohibitions, yet the Temporal Courts cannot prohibit the impeaching or drawing it into question by the Spiritual Court. Act. 305.

There is a great difference between marriage within the Levitical prohibitions, and marriage within the Levitical degrees, which commonly are taken to be the same. For marriage within the Levitical prohibitions was always unlawful to the Hebrews by Gods Law, that is, the Mosaick Law: But marriage within the Levitical degrees was not always unlawful; for marriage between persons of the same nearness in Affinity or Consanguinity, which only makes the degree, was in some case and circumstance unlawful, in others lawful: So a marriage unlawful, and a marriage lawful as the Circumstance varied in the same degree, that is, the same nearness of Relation.

The Levitical degrees, qua such, are set forth by no Act of Parliament; but marriages which fall within some of those degrees, are said to be marriages within the degrees prohibited by Gods Law, by 28 H. 8. c. 7. & 28. H. 8. c. 16.

Nor is it said in any Act of Parliament, That all marriages within the Levitical degrees are prohibited by Gods Law,

Sir Edward Coke in the first Edition, but not in the rest, of his Littleton, hath, I confess, these words; By the Statute of 32 H. 8. it is declared, That all persons be lawful, that is, may lawfully marry, that are not prohibited by Gods Law to marry, that is to say, that be not prohibited by the Levitical degrees. Cok. Litt. c. 235. a. Edit. 1.

By which he makes all Gods Law, by which any marriage is prohibited to be the Levitical degrees, which is not so; nor doth he constare sibi, for in his Comment upon the Statute of 32 H. 8. he saith expressly,

So if a man marry his fathers brothers wife, it is a marriage within the Levitical degrees. Yet if the fathers brother were by the half blood only of the mothers side, the Rabbies and Scribes held such marriage not unlawful by the Levitical Law, but by the Sanctions of the Elders. Many such cases may be found to Seld. Uxor E-
prohe a marriage may be lawful, though it be a marriage within braica, l. 1.c.2.
the Levitical degrees: But none of those can therefore be prohibited f. 8.
to be impeached, for they are not marriages without the Levitical degrees, as the Statute requires.

Accordingly Sir Edward Coke commenting upon the Statute, Cok. Inst. 2. E. of 32 H. 8, in his second Institutes, sets forth a Scheme of the ^{683.} Levitical degrees, as necessary to the exposition of that Statute, and therein enumerates the marriage of the wives husband with her sister to be both within the Levitical degrees, and prohibited by the Eighteenth Chapter of Leviticus.

One Man was sued before the High Commissioners, 33 Eliz. Mans Case. ^{Keley & B.} for marrying his wives sisters daughter, and a Prohibition was Moore's Rep. 12 Ad. Ell. granted, as Moore Reports the Case, because the marriage was f. 907. 2. Ant. 247. not prohibited by the Levitical Law, which was no Reason.

Crook reports the same Case, and that a prohibition was Crook. 33 Eliz. granted, but that a Consultation was after granted, and that f. 228. Mans Case. a sentence of Divorce was given.

In reporting this Case of Mans, Justice Crook's words are, A Consultation was granted, because the Prohibition is not to be, if the marriage be not within the Levitical degrees.

Which is a great mistake; for if the marriage be within the Levitical degrees, no prohibition ought to issue; for it ought not to be but when the marriage is without the Levitical degrees.

Then he adds, But here the prohibition was general, and therefore not good; which is not intelligible, whatever he intended by it.

For by the Libel it must necessarily appear to the Court, That the marriage in question was either without the Levitical degrees, or within them.

If it were without the degrees, the Court did most unjustly to grant the Consultation, for it ought not to have been granted.

If the marriage were within the Levitical degrees, it had been unjust not to grant a Consultation.

But

Leviticus : As the marriage of the father with his own daughter, Of the Grandson with his Grand-mother or Grand-fathers wife, Of the Son with his Mothers brothers wife, Of the Uncle with his brothers or sisters daughter, which since appears by Sir Edward Coke to be a prohibited marriage, and others upon like reason. Cok. Inst. 2. f. 683, 684.

And was resolved in Archbishop Laud's time, in the Case of Sir Giles Alington, who was deeply fined, and a Sentence of Divorce given for marrying his brother or sisters daughter, which I heard at Lambeth House.

And no prohibition was granted, though moved for, as was very probable, and commonly reported; but we find no Record of Prohibitions denied, for there is no Entry made of Motions not granted, but of Prohibitions granted there is, which makes the granting of a Prohibition of no great Authority, unless upon Action brought a Consultation be denied upon Demur-
rer.

So of the husband with his wives sisters daughter.

The third Assertion.

As to the third Assertion, That admitting this marriage be Act. 305. without the Levitical Degrees, yet it is prohibited by Gods Law, and therefore to be impeached notwithstanding the Statute of 32 H. 8. whose words are, No marriage, Gods Law excepted, shall be impeached without the Levitical degrees.

When an Act of Parliament declares a marriage to be against Gods Law, it must be admitted in all Courts and Proceedings of this Kingdom to be so.

By an Act, 25 H. 8. c. 22. intituled, An Act declaring the Establishment of the Succession of the Kings most Royal Majesty in the Imperial Crown of this Realm.

Among sundry marriages declared by that Act to be marriages within the degrees of marriage prohibited by Gods Law, the mar-
riage of a man with his wives sister is expressly declared to be prohibited by Gods Law, and that a Divorce should be of such marriage, if any such were.

But this Act is expressly repeal'd. by an Act in 28 H. 8. c. 7. intituled, An Act for the Establishment of the Imperial Crown of this Realm.

By

Whence it follows, That this marriage is not now probed he to against Gods Law, by either of these repeal'd Statutes of 25 H. 8. or 28 H. 8. c. 7. unless it be made out, that one of them at least remains at this day in force. And as for that,

The Act of 28 H. 8. c. 16 which makes void all Dispensations from the See of Rome, and expressly revived by 1 Eliz. and all Branches, Wards, and Sentences thereof, hath these words, As a Grace of the Kings to divers of his Subjects, who had married by Dispensation, notwithstanding that Act made all Dispensations from Rome void.

All marriages had from the Third of November, 26 H. 8. for which no Divorce or Separation is had, and which marriages be not prohibited by Gods Laws, limited and declared in the Act made this present Parliament for Establishing the Kings Succession, or otherwise, by Holy Scriptures, shall be good. By which words I conceive the Clause of 28 H. 8. c. 7. repeal'd in Queen Maries time, is again reviv'd.

It may be objected, The Clause of 28 H. 8. c. 7. concerning Obj. marriages prohibited by Gods Law, continues still repeal'd, because it is not specially mentioned to be reviv'd by the Act of 1 Eliz. And therefore no Act is in force declaring the husbands marriage with his wifes Sister to be prohibited by Gods Law.

An Act repeal'd is of no effect more than if it had been Answ. never made.

By the Act of 28 H. 8. c. 7. All marriages prohibited by Gods Law, limited and declared by the Clause of that Act, were unlawful, notwithstanding any Dispensation had before the Repeal of that Clause.

By the Reviver in 1 Eliz. of 28 H. 8. c. 16 and of every Clause in it, All marriages prohibited by Gods Law, limited and declared by 28 H. 8. c. 7. were again unlawful, as before the Repeal, notwithstanding any Dispensation.

Therefore the Statute of 28 H. 8. c. 7 was revived by the Reviver of the Statute of 28 H. 8. c. 16. in 1 Eliz. and made as effectual as before it was repeal'd, and so it continues.

If it had been enacted by Parliament after the Repeal of the Clause in 28 H. 8. c. 7. That all marriages prohibited by Gods Law, limited and declared by 28. H. 8. c. 7. should be unlawful, notwithstanding any Dispensation that enacting had reviv'd the Clause in 28 H. 8. c. 7. .

That if there were any Divorce or Separation made of any such marriages by the Arch-bishops or Ministers of the Church of *England*, such Separation should remain good, and not be revokable by any Authority ; and the Children procreated under such unlawful marriage, should be illegitimate.

And if any such marriages were in any the Kings Dominions without Separation, that there should be a separation from the Bonds of such unlawful marriage.

Now we must observe, the Act of 1 & 2 Phil. & Mar. c. 8. doth not repeal this Act entirely of 28 H. 8. c. 7. but repeals only one Clause of it ; the words of which Clause of Repeal are before cited, and manifest this second Clause of the Act of 28 H. 8. and not the first to be the Clause intended to be repeal'd.

For there was no reason to repeal the Clause declaratory of marriages prohibited by Gods Law, which the Church of Rome always acknowledged ; nor do the words of Repeal import any thing concerning marriages within degrees prohibited by Gods Law.

But (as the time then was) there was reason to repeal a Clause enacting all Separations of such marriages with which the Pope had dispens'd, should remain good against his Authority and that such marriages with which he had dispens'd, not yet separated, should be separate.

And the words of the Clause of Repeal manifest the second Clause to be intended, viz. All that Part of the Act made in the said Eight and twentieth year of King *Henry* the Eighth, which concerneth a prohibition to marry within the degrees expressed in the said Act, shall be repeal'd, &c.

As it is true, That if a marriage be declared by Act of Parliament to be against Gods Law, we must admit it to be so ; for by a Law (that is, by an Act of Parliament) it is so declared.

By the same reason, if by a lawful Canon, a marriage be declared to be against Gods Law, we must admit it to be so ; for Canon-Law. a lawful Canon is the Law of the Kingdom, as well as an Act of ^{What Canon} Parliament : And whatever is the Law of the Kingdom, is as much ^{good a Ventriss,} & ^{2 Levins} the Law as any thing else that is so ; for what is Law doth not ^{222.} suscipere magis aut minus.

But by a lawful Canon of this Kingdom, which is enough, and not only so, but by a Canon warranted by Act of Parliament, the marriage in question is declared to be prohibited by Gods Law, therefore we must admit it to be so.

By the Act it is said, That the Clergy of this Kingdom, nor any of them, shall henceforth enact, promulgate, or execute any Canons, Constitutions, or Ordinances Provincial, by whatsoever name or names they may be called, in their Convocations, in time coming, which shall always be assembled by Authority of the Kings Writ, unless the same Clergy may have the Kings most Royal Assent and Licence to make, promulge, and execute such Canons, Constitutions, and Ordinances Provincial, &c.

The Chief Justice delivered the Resolution of the Court;
And accordingly a Consultation was granted.

In

They find the Act of 12 Car. 2. c. 25. and the confirmation of it concerning the giving Licences to retail Wine, and the Proviso therein prout.

Provided also, That this Act, or any thing therein contained, shall not extend, or be prejudicial to the Master, Wardens, Freemen, and Commonalty of the Mystery of *Vintners* of the City of *London*, or to any other City or Town Corporate, but that they may use and enjoy such Liberties and priviledges, as heretofore they have lawfully used and enjoyed.

They find. That the Master, Wardens, Freemen, and Commonalty of the Mystery of *Vintners* in the City *London*, was an ancient Corporation of the said City of *London*, at the time of the Act of 12 Car. 2. and incorporated by the Name of Master, Wardens, Freemen, and Commonalty of the Mystery of *Vintners* of the City of *London*.

They find, That the Defendant, three years before, and during all the time in the Information, used the Trade of retailing of Wine, and kept a Tavern in the Parish of *Stepney* in the County of *Middlesex*, was an Inhabitant there, and that the Defendants house, in which the said Wine was sold, is within two miles of the City of *London*.

They find, That the Defendant, within the time in the Information mentioned, did sell Ten pints of Sack, as in the Information mentioned, to be drunk and spent in his said dwelling house, being a Tavern, in the said Parish of *Stepney*.

They find, That at the time of the sale of the said Wine, and three years before, the Defendant was a natural born Subject of the King, and a Freeman of the City of *London* of the said Company of *Vintners*.

Si pro quer. quoad 50 l. pro quer.
Si pro Def. pro Def. 1 s.

Upon this Special Verdict three Questions have been raised.

1. Whether the Patent of 9 Jac. was not hold in its Creation?
2. Admitting it was not hold in its Creation, Whether it became hold by the death of King James?

Before I enter upon it, I must previously assent, That every act a man is naturally enabled to do, is in it self equally good, as any other act he is so enabled to do. And so all the Schoolmen agree, *That Actus qua actus non est malus.* And that mens actus are good or bad only as they are precepted or prohibited by a Law, according to that Truth, Where there is no law there is no transgression. Whence it follows, *That every Malum is in truth a Malum prohibitum by some Law.*

Actus. 4. 15.
Sed. de Jus.
Nat. 45 Scill.
Ecc. Can. 35.

In the next place, I mean be the word (Dispensation) when I use it, another thing than some of my Brothers defined it to be, namely, That it was *Liberatio a pena*; or as others, That it is *provida relaxatio Juris*, which is defining an *ignotum per ignotius*; but *liberare a pena*, is the proper effect of a pardon, not of a dispensation; For a dispensation obtained doth *jus dare*, Post. 345. and makes the thing prohibited lawful to be done by him who hath it, upon which depends the true reason of many Cases which admit not of dispensation; but a pardon frees from the punishment due for a thing unlawfully done. Yet freedom from punishment is a consequent of a dispensation, though not its effect. But so it is also a consequent of repealing the Law, and a consequent of an exception at the making of the Law of some particular person or persons from being bound by the Law.

I come now to the Case it self of 11 H. 7. wherein I agree, *That with Malum prohibitum by Stat. indefinitely understood the King may dispense.*

But I deny that the King can dispense with every Malum prohibitum by Statute, though prohibited by Statute only.

1. The King may pardon Nusances that are transient, and not continuing, as a Nusance in the High way, which still continues, and is not ended, until removed, cannot be pardon'd: So of a Water-course diverted, or a Bridge broken down, they Cok. Pla. Co-
ron. L. 137. cannot be pardon'd so as to acquit the Nusance maker for committing them; but the fine or punishment impos'd for the doing may be pardon'd.

But breaking the Assise of Bread and Ale, forestalling the Markets, ingrossing, regrating, or the like, which continue not, but which are over as soon as done, until done de novo again, may be pardon'd, like other offences: So as the Offender shall not be impleaded for them, otherwise than by persons who have receiv'd Post. 335. particular damage, which the King cannot remit; this difference Post. 202. holds in offences by penal Laws.

As the Laws of Nusances are pro bono publico, so are all general penal Laws; and if a Nusance cannot be dispens'd with for that reason, it follows, no penal Law, for the same reason, can post 341. be dispens'd with.

Therefore the reason is, because the parties particularly damaged by a Nuisance, have their Actions on the Case for their damage, whereof the King cannot deprive them by his dispensation: And by the same reason, other penal Laws, the breach of which are to mens particular damage, cannot be dispens'd with. P. 342.

3. Nusances and Ills prohibited by penal Acts of Parliament, 4 R. 2. 31.
are of the same nature as to the publicque, although (as the Law
is now received) the mala in documenta prohibited by Acts of Parliament, are not presentable in Leets, or the Sheriff's Court, as Nusances at Common Law are, of which some questionable cannot be dispens'd with; as obstructing the High-way, diverting a Water-course, breaking down a Bridge, breaking the Assize of Bread and Ale : for as to these, the parties particularly damaged by them have their Actions, which the King cannot discharge.

4. Other ancient Nusances are by which no man bath a particular damage or gation for it, as if a man buy provision coming to the Market by the way (which is a Nusance by forestalling the Market) and sells it not in the Market forestall'd, no gation lies for a particular damage to any man, more than to every man; but the King may punish it.

Go if a man buy Corn growing in the field, contrary to the Statute of 5 E. 6. c. 14. he is an Ingroffer: So selling Corn in the Sheaf is against the Common Law by Robert Hadam's Case, Cok. f. 197. c. 89. Hil. 2; E. 3. coram Rega. but no particular person can have an Action for such ingrossing more than every man; yet these are Nusances by the Common Law, but so made by prohibiting Laws beyond memory: As by a Law of King Athelstan's, Ne quis extra oppidum quid emat, soystalling was prohibited. And by several Laws of William the First, Ne venditio & emptio fiat nisi coram testibus & in civitatibus. Item nullum mercatum vel forum sit, nec fieri permittatur, nisi in civitatibus regni nostri. And no way differ from publice evils now prohibited by Parliament, and may, by it, be permitted; for the Statute of 15 Car. 2. c. 5 gives leave to ingross without soystalling, when Corn exceeds not certain Rates. Now see I any reason why the King may not dispense with those Nusances by which no man hath right to a particular Action, as

For a Law which a man cannot obey, nor act according to it, is void, and no Law: And it is impossible to obey contradictions, or act according to them.

Therefore I may conclude those things to be mala in se, which can never be made lawful.

The instances in that Book of 11 H. 7. are none of these, but these: the words are, But malum in se, the King nor any other can dispense. And instanceth,

Si come, si le Roy, voyloit pardon de occider un homme ou de faire nuisance in le haut chemin, ceo est void.

Where by the way, pardon is mis-printed for poial done, for the King may pardon killing a man; but if the King will give power to kill a man, or to make a nuisance in the high-way, it is void.

And upon the same reason, a licence to impison a man, to take his Land, his Horse, or any thing that is his, from him, is void.

For in life, liberty, and estate, every man who hath not forfeited them, hath a property and right which the Law allows him to defend; and if it be violated, it gives an Action to redress the wrong, and to punish the wrong-doer.

Therefore a dispensation, that is to make lawful the taking from a man any thing which he may lawfully defend from being taken, or lawfully punish if it be, must be void.

For it is a contradiction to make it lawful, to take what may be lawfully hindered from being taken, or lawfully punished, if it be.

And that were to make two men have several plenary rights Act. 189. 192 in the same thing at the same time, which no Law can effect: Therefore to do a thing which no Law can make lawful, must be malum in se.

But these instances differ from the former; for killing a man, or taking from him his Lands or Goods, is not impunit, ex vi termini, that which is unlawful, as Murther and Stealing do; for in many Cases killing a man, or taking his liberty or goods from him, is lawful, and where it is not, may by a Law be made so, which the other can never be.

As every new capital punishment enacted by Law, makes killing a man lawful, where it was not before; every new aid granted out of menselice, makes a taking from men lawful that was not before.

But

And thus we see violation of property is a malum per se by that Book of 11 H. 7. and the reason why it is so, and cannot be dispense'd with.

William, v. Will.
8 ad. 22. 327.

A third kind of malum per se by that Case of 11 H. 7. is that in H. 7. which the Law of the Land admits to be specially prohibited, Jure Divino, Ex iſſint le Roy, ne nul Eveſque ou Presbiter poit deſce li- cence a un de faire Lechery, Quia eſt malum in ſe, ſaith the Bouch, that is Coinion without wedlock, which offence, when by mutual conſent, injuries no property, having two husbands or two wives at the ſame time; but that is alſo againſt the property of the firſt husband or wife, marriage within the Levitical degrees. *All 32 H. 8. c. 38.* which are admitted by the Law of the Land to be prohibited, Jure Divino, and cannot be dispense'd with; For no Human authority can make lawful what Divine authority hath made unlawful, without Gods leave, and then it is by his authority.

Many more particularſ fall under this head, which I shall not now mention. Thenes I infer mala in ſe to be only ſuch as Post 359. ſimply a contradiction to be made lawful, and conſequently what may be made lawful by Human Law to be no malum in ſe, as not diſſering from other things which may be permitted or prohibited occaſionally, at the pleaſure of the Law-maker.

The King cannot diſpene with a Nufance to the High ways by 11 H. 7. and conſequently, as ſome think, with no other publicque Nufance, by ~~the~~ Edward Coke. For all common Nufances, as not repairing Bridges, High-ways, &c. the Quilt is the Kings, but he cannot pardon or diſcharge the Nufance or the Quilt for the ſame, the High-ways being neceſſary to ſupport ſuch of his Subjects as are occaſioned to travel them: Of this more hereafter.

Cok. Pleas of
the Crown, L.
237, c. 105.

The ſpecifical offences, which are publicque Nufances, I do not reckon to be mala in ſe, as ſome do, because though it be admitted none of them can be dispense'd with, yet a Law may make them lawfull; and if ſo, they are not mala in ſe, as before.

But either a diſpensation, or a Law to concur Nufances (in those terms) I conceive to be void, because the word Nufance *Ant. 336.* impoſes a thing, vi termini, that is unlawfull, as Trespass doth; and therefore it is a contradiction to make it lawful by a diſpensation or Law.

But by a Law, a Baker or Victualler may ſell Bread or Ale Post 358. of ſuch weight or measure as he pleaſeth, and as they did before *Ant. 335.* the Aſſize was made. By a Law a Water-course may be diſ- ſed; Corn growing in the field, or Provision going to a Mar- ket may be bought up by the way, which are Nufances in Specie,

No non obstante can dispense in these Cases, and many ^{8 H. 6. f. 19.} the like, for that were to grant that a man should not ^{The Chan-} have lawful Actions brought against him, or be implead- ^{celor of Ox-}
^{fords Case.} ed at least in certain Actions, which the King cannot ^{Br. Pat. n. 15.} grant.

For the same reason the King cannot licence a Baker, ^{Stat. de Pistoribus c. 7.} Bawer, or Ciduallar, to break the Assise of Bread or Ale, ^{31 E. 1.} nor a Miller to take more Toll than the Law appoints, nor ^{ribus c. 7.} a Taverner to break the Assise of Wine, nor a Butcher to sell meated Swines flesh or Murrain flesh, nor any man to forestall the Market by a non obstante of the Statute de Pistoribus, which prohibits all these under severe penalties.

Noz can he licence Butchers, Fishmongers, Poultrers, or other sellers of Cidualls, nor Postlers to sell Hay and Oats at what price they please, by a non obstante of the Statute of 23 E. 3. c. 6. and 13 R. 2. c. 8. which require that the ^{Stat. 23 E. 3. c. 6.} prises be moderate. And it was so resolved and decreed in ^{13 R. 2. c. 8.} the Star-Chamber by opinion of all the Judges, 9 Car. 1. and ^{9 Car. 1. Cam-} that the Justices of the Peace, in the respective Counties, were ^{Stell.} to ascertain the prises of Hay and Oats.

He cannot licence a Labourer to take more wages, nor any ^{Regul. f. 190.} Officers to take more Fees than the Law allows, nor to restrain a mans Plough-Beasts, where there is other ^{a. tit. de Servi-} ^{Table of the} beasts; for in these, and multitudes of like cases the damaged person hath his Action equally as for a Nuisance, to his particular hurt. ^{entibus. In the Register the Title is de Laborariis.}

And even in the Case of a Common Informer, who cannot sue but in the Kings Name, as well as his own, when he is once intitled to Action, which he never is but by commencing Suit, for then the Action popular is become his proper Action, the King can neither pardon, release, or otherwise discharge his ^{Act. 334.} right in the Suit, as is fully resolved 1 H. 7. and in many ^{1 H. 7. f. 3.} other Books, much less can he discharge or prevent the Action of any other man.

The Statute of 12 Car. 2. c. 25. upon which this Case ^{12 Car. 2. c. 25.} riseth, hath examples of penal Laws in both these kinds.

1. Every man is prohibited to sell Wine by retail, contrary to the Act, upon forfeiture of Five pounds for every offence; from which offence no third man can possibly derive a particular damage to himself, for which he can have an Action upon his Case.

If an Ad quod damnum issue to enquire ad quod damnum vel prajudicium, a licence for a Mortmain will be: One Inquiry is ---- Si patria per donationem illam magis solito non oneretur, &c. Though the Return be, that by such licence patria magis solito oneretur, yet the Licence, if granted, will be good, which shews that Clause is for Information of the King, that he may not licence what he would not, and not for Restraint, to hinder him to licence what he would. For by Fitz-herbert the usual licence now is with ---- Et hoc abique aliquo brevi de Ad quod damnum. And when the King can licence without any Writ of Ad quod damnum, he may, if he will, licence whatever the Return of the Writ be. Though it be laid in the Case of Monopolies, That in the Kings Grant it is always a Condition expressed or implied, Quod patria plus solito non oneretur, but that seems but gratis dictum.

So if the King will, ex speciali gratia, licence a Mortmain, the Chancelloz need not issue any Ad quod damnum, for the King, without words of Non obstante, is sufficiently appys'd by asking his licence to do a thing, which at Common Law might be done without it, that now it cannot be done without it. And that is all the use of a Non obstante.

But whether in such Cases licences limited to certain quantities of the Commodities to be imported be good (as some collect from that Case, as it is reported, which appears not by the Judgment) nor in what Cases licences may be general, or ought to be limited, is not now properly before us.

1. If Exportation, Importation of a Commodity, or the exercise of a Trade be prohibited generally by Parliament, and no cause expressed of the Prohibition, a licence may be granted to one or more without limitation to Export or Import, or to exercise the Trade: For by such general Restraint the end of the Law is conceived to be no more than to limit the over-numerous Exporters, Importers, or Traders in that kind, by putting them to the difficulty of procuring licences, and not otherwise, and therefore such general licences shall not be accounted Monopolies.

2. In such Cases the Law implies the King may licence as well as if the prohibitory Law had been that no such Importation, Exportation, or Trading should be without the King's express licence, in which Case the licence requires no limitation to a certain quantity.

3. It

3. A Licence to convert some quantity of their ancient Ara-
ble Land into Pasture, which was prohibited by the Acts of
4 H. 7. 5 Eliz. and divers other Laws, most of which were
repeal'd in 21 Jac. which is not material, as to the Question
in hand. And that is an Offence also at the Common Law, and
I remember it proceeded against as such, tempore Car. 1. in the
Star Chamber, after the Repeal of most of the Statutes prohib-
iting it.

4. A Licence to convert part of their Wood-land into Ara-
ble, contrary to the Statute of 35 H. 8. and contrary also to 35 H. 8. c. 17.
the Common Law.

I have a Note of a Charter of King John to an Abbot and
his Convent, by which they had Licence, Nemora sua pertinentia
Domui suae redigere in culturam.

5. Licence to erect some Cottages upon their Waste, or other
Lands, contrary to the Statute of 31 Eliz. c. 7. 31 El. c. 7.

6. A Licence to erect a Fair or Market.

7. A Licence to an Abbot and his Convent, to appropriate a Pl. Com.
Rectory. Grendon C.

In all these Cases the King hath no knowledge of the persons
themselves, or of their number, to whom he grants his Licence
or Dispensation; Therefore that can be no reason to avoid the
Charter of the Corporation of Vintners.

A Dispensation or Licence properly passeth no Interest, nor al-
ters or transfers Property in any thing, but only makes an Action
lawful, which without it had been unlawful. As a Licence to go
beyond the Seas, to hunt in a mans Park, to come into his
House, are only Actions, which without Licence, had been un-
lawful.

But a Licence to hunt in a mans Park, and carry away the
Deer kill'd to his own use; to cut down a Tree in a mans
Ground, and to carry it away the next day after to his own
use, are Licences as to the Acts of Hunting and cutting down the
Tree; but as to the carrying away of the Deer kill'd, and Tree
cut down, they are Grants.

So to licence a man to eat my meat, or to fire the wood in my
Chimney to warm him by, as to the actions of eating, firing
my wood and warming him, they are Licences; but it is conse-
quent necessarily to those Actions that my Property be destroyed
in the meat eaten, and in the wood burnt, so as in some Cases
by consequent and not directly, and as its effect, a Dispensation ^{Act. 33.}
or Licence may destroy and alter Property.

1 E. 6. 7.

Johanni Gale Mil Licenc. pro omnibus suis servis sagittare in vibrell. non obstante Act. Parliament. Conf. Tho. Com. Sonth.

2 R. 3. 1.

A Proclamation dispensing with a penal Statute touching Cloth-making, 1 R. 3.

9 Eliz. 3.

Henr. Campion & al. Brasiator. de Lond. & Westm. licenc. retinere alienos in servitiis suis.

27 H. 8. 2.

Major. Civitat. Heref. Licenc. perquirere terram ad Annuum valorem 40 Marcarum, non obstante Statuto.

36 Eliz. 3.

Ballivis, &c. de Yarmouth, magna Licenc. transportare 40000 quarter. frument. & gran. infra 10 Ann.

26 Eliz. 7.

President. &c. Mercatorum Hispanie & Portugal. infra Civitat. Cestir. Licenc. transportare 10000 Dickers of Leather per 12 Ann.

1 M. 2.

Mercatoribus de le Stillyard, Licencene for three years to Export any manner of Woollen Cloth, at 6 L and under, unrowed, unbarbed, and unshorn, without forfeiture.

1 M. 11.

Mercatoribus periclitant. a Licence to transport all manner of Woollen Cloth, non obstante Stat.

Roberto Heming & alios, Licence to sell Faggots within London and Westminster, non obstante Stat.

2 Jac. 22.

A Licence to the Gun-makers of London to transport Guns.

4 Eliz. 3.

A Licence to the Mayor, &c. of Bristol, that they may lade and unlade their Ships, &c. of their Goods, and lay the same on Land, and from Land to transport them, Non obstante Statut.

6 Eliz.

First, It is against the known practice since the Statute of Answ. 1.
7 E. 6. That the King cannot dispense for selling of Wine, for
that Objection reaches to Dispensations with single Persons as
well as Corporations.

2. The reason why the King cannot dispense in the Cases of Answ. 2.
buying Offices and Simoniacal Presentations, is because the ^{Ant. 354.}
persons were made incapable to hold them; and a person inca- ^{Hob. 75.}
pable is as a dead person, and no person at all as to that
wherein he is incapable: For persons entred in Religion,
and dead in Law, were not to all purposes dead, but to such
wherein they were incapable to take or give.

3. A Member of the House of Commons is by 7 Jac. perso- Answ. 3.
na inhabilis, and not to be permitted to enter the House before
the Oath taken. A particular Action is given by 2 H. 4. for
such Suit in the Admiralty, and such Licence gives the Admi-
ralty a Jurisdiction against Law, 4 & 5 P. M. Dyer 159. Domingo
Belatta's Case.

A third Objection was, That this general Dispensation an. Obj. 3.
answers not the end and intention of the Act of 7 E. 6. but seems
to frustrate and null that Law wholly: And though the King
can dispense with penal Laws, yet not in such manner, as to an-
nihilate and make them void.

If this Objection held good in fact, it is a material one; Answ. 1.
but the Act of 7 E. 6. intended not that no Wine should be
sold, nor that it should be with great restraint sold, but not
so loosely as every man might sell it. And since it is admitted
that the Act of 7 E. 6. restrains not the King's power to licence
selling Wine (which perhaps was more a Question than this
in hand) it is clear the King may licence, as if the Act had
absolutely prohibited selling Wine, and left it to the King
to licence as he thought fit, not abrogating the Law. And
if so,

The end of the Act being only that every man should not Answ. 2.
sell Wine that would, as they might when the Act was made,
and not to restrain convenient numbers to sell for the King-
doms use,

The King could not better answer the end of the Act, than
to restrain the sellers to Freemen of London,

To the Corporation of Vintners, men bred up in the Trade, Answ. 3.
and sending Apprentices in it.

And

Answer hath been offered to the President of Waterford, by Obj. 6. which the King dispense'd with the Offence of not bringing the Staple Merchandise from Ireland to Calais, being so penal, which was an Offence by 10 H. 6. c. and 14 H. 6. c. to the universal hurt of the Kingdom, and therefore much greater than selling of Wine contrary to the Statute of 7 E. 6. c. but that was as hath been said,

Because those Merchants were to pay Custom to the King, which was his Inheritance, and with which he could dispense.

This put together sounds thus, The Merchants of Water- Answ. ford were to pay Customs to the King for their Staple Mer- chandise, for which he might dispense if he would, but ne- ver did, for any thing appears: The Merchants of Water- ford were, upon penalties, to bring their Staple Merchandise to Calais, with which the King could not dispense, had no Customs been due from them, yet he did dispense, with them for that which he could not, viz. bringing their Goods to Calais, because he did not dispense with them for that which he could, viz. their Customs; there is no Inference nor Co- herence in this Answer.

But it also appears by the Statute 27 E. 3. c. 11. of the Staple for the reason therein given, that the Merchants of Ireland were to pay their Customs in Ireland, and to bring their Caskets of their payments there to the Staple, lest otherwise they might be doubly charg'd.

Therefore the Customs which were paid in Ireland before the Goods brought to the Staple, was no cause for di- spensing with the Corporation of Waterford for not bringing their Merchandise to the Staple, according to the penal Laws for that purpose. The Licence of Edward the Third, pleaded by the men of Waterford, was perhaps after the Statute of 27 E. 3. when they were not to pay their Cu- stoms at the Staple, but however, the Licences by them pleaded, 1 H. 7. by Henry the Sixth, and Edward the Fourth, were long after they were to pay their Customs in Ireland, and not at the Staple.

I must say as my Brother Atkins observed before, That in this Case the Plaintiffs Council argue against the Kings Prerogative, for the extent of his Prerogative is the extent of his Pow- er, and the extent of his Power is to do what he hath will to do, ac- cording to that, *ut summæ potestatis Regis est posse quantum velit, sic magnitudinis est velle quantum potest*; if therefore the King have a will to dispense with a Corporation, as it seems K. James had in this

Case,

allowed by the late Laws when Corn is at a certain low price, Ant. 335. quare the Law tempore Car. 2. the pulling down of Bridges wholly, or placing them in other places, may be done by a Law; and what may be, or not be, by a Law, is no malum in se, more Ant. 339. than any other prohibitum by a Law is. 1 Levius. 217.

Judgment was given by the Advice of the Judges in the
Kings Bench, Quod Querens nil Capiat.

A a a 2 *Micb.*

of such issue, to William Vescy the Son, and the heirs males of his body; and for default of such issue, to Matthew Vescy, and the heirs males of his body; and after the Six and twentieth of December, 1628. at Tickhill aforesaid, died so seis'd. And the said John, after his death entred, and was seis'd by force of the said gift, and died so seis'd without heir male of his body.

After the death of John, Robert entred by vertue of his said Remainder, and was seis'd accordingly, and so seis'd, died without heir male of his body, after whose death William entred by vertue of his said Remainder, and was seis'd accordingly; and he being so seis'd, Matthew died without heir male of his body, and after the said William died seis'd of the Premisses without heir male of his body: After the death of which William the Son, for that he died without heir male of his body begotten, the right of the Premisses reverts to the said Elizabeth and Sarah, who, together with their said Husbands, demand as Cosens and Coheirs of the said William the Grandfather, that is to say, Daughters and Coheirs of the said John, Son and Heir of the said William the Grandfather, and which after the death of the said John, Robert, William, and Matthew, for that they died without any heir male of their bodies, ought to revert to them.

The Tenant Anne for Plea saith, That the said William, The Barr. whose Cosens and Coheirs the said Elizabeth and Sarah are, by his Deed dated the Seventh of November, 1655. In consideration of a marriage to be solemnized between him and Anne the now Tenant, then by the name of Anne Hewett, and of 1200 l. marriage Portion, and for a Joynure for the said Anne, and in satisfaction of all Dower, she might claim out of his Lands; And for settling the said Lands upon the issue and heirs of the said William, to be begotten of her the said Anne,

Infeoffed James Lane and John Lane Gentlemen, of the said Premisses, Habendum to them, their heirs and assigns for ever, To the use of the said William Vescy the Feoffor and his assigns, for term of his life, without impeachment of Waste, and after to the use of the said Anne the Tenant (if the Marriage succeeded between them) for term of her life for her Joynure, and after her decease to the use of the heirs males of his body on her body begotten for ever; and for want of such issue, to the use of the heirs females of him the said William Vescy upon her body begotten; and for want of such issue, to the use of the right

The Case upon the Pleading.

William Vesey seis'd of the Land in question in his Demesne, as of Fee, held of King Charles the First, in free Socage, as of his Honour of Tickhill, by his last Will and Testament devised the same to John Vesey his eldest Son, and the heirs males of his body; and for default of such to Robert Vesey, and the heirs males of his body; and for default of such to William Vesey his Son, and the heirs males of his body; and for default of such to Matthew Vesey, and the heirs males of his body, and died. Then John entered, and died seis'd without issue male, leaving two daughters, Elizabeth and Sarah, now Defendants, together with their husbands.

After his death Robert entered, and died seis'd, without issue male.

Then William entered, and was seis'd, and Matthew, in the life of William, died without issue male.

William, by his Deed Indented in Consideration of an intended marriage with Anne the now Tenant, and for other Considerations, infeoffed James Lane and John Lane, Habendum to them and their Heirs, to the use of William the Feoffor, for term of his life, and after to the use of Anne Hewet, now the Tenant, for her life; then to the use of the heirs males of his body upon her begotten; and for default of such, to the use of the heirs females of his body on her begotten; and for default of such, to the use of his right Heirs: And bound him and his Heirs to warrant to the said Feoffees and their Heirs.

William, by vertue of the said Feoffment, and of the Statute of Uses, was possessed, and after he married the now Tenant, and died seis'd, as of his freehold, without any issue of his body.

After his death, Anne his wife, now Tenant, by vertue of the said Feoffment, and Statute of Uses, entered and was possessed.

Against whom, Elizabeth and Sarah, Daughters and Coheirs of John Vesey, and Collins and Coheirs of William the Feoffor, bring their Formedon in the Reverter

Anne

Cestuy que use, nor his Heir, could not, nor can warrant to himself; but as to William and his Heirs, the warranty is clearly extinct.

The Argument.

And as to the first Question, I conceive the Law to be that ^{Act. 36.} the warranty of William, the Tenant in tayl, descending upon Elizabeth and Sarah the Demandants, his Heirs at Law, is no barr in the Formedon in Reverter brought by them, as Heirs to William their Grandfather, the Donor, though it be a Collateral warranty.

I know it is the persuasion of many professing the Law, ^{That by the Statute of Westminster the second, De donis conditionalibus, the Lineal warranty of Tenant in tayl shall be no barr in a Formedon in the Descender, but that the Collateral warranty of Tenant in tayl is at large, as at the Common Law unrestrain'd by that Statute.}

Sir Edward Coke, in his Comment upon Section 712. of ^{Co. Litt. 712.} Littleton, A lineal warranty doth not bind the right of an Estate tayl, for that it is restrain'd by the Statute de donis Conditionibus: And immediately follows, A lineal warranty and assets is ^{Co. Litt. 374} a barr of the right in tayl, and is not restrain'd.

But the reason why the warranty of Tenant in tayl, with Assets, binds the right of the Estate tayl, is in no respect from the Statute de donis, but is by the Equity of the Statute of Gloucester, by which the warranty of Tenant by the Courtesie bars not the Heir, for the Lands of his Mother, if the Father leave not Assets to descend in recompence.

And therefore it was conceived, after the Statute de donis was made, That if Tenant in tayl left Assets to descend in Feesimple, his warranty should bind the right of the Issue in tayl by the equity of that preceding Statute of Gloucester.

Whereas if the Statute of Gloucester had not been, the Lineal warranty of Tenant in tayl had no more bound the right of the Estate tayl by the Statute de donis, with Assets descending, than it doth without Assets.

My second Assertion is, That the Statute de Donis re-^{Ass. 2.} strains not the warranty of Tenant in tayl from barring him ^{Post 377.} in the Remainder in tayl by his warranty descending upon him.

1. For that the mischief complained of, and remedied by the Statute, is, That in omnibus predictis casibus *theretin* recited, post prolem fuscitatam habuerunt illi quibus Tenementum sic conditionaliter datum fuit hucusque potestatem alienandi Tenementum sic datum, & exhaeredandi exitum eorum contra voluntatem Donatoris. But the warranty of the Donee in tayl descending upon him in the Remainder, who regularly claims by purchase from the Donor, and not by descent from the Donee in tayl, could be no disinheriting of the Issue of the Donee, claiming by descent from him, against which disinheriting only the Statute provides, which is evident by the Writ of Formedon in the Descender, framed by the Statute in behalf of such Issue of the Donee, whom the Statute intends.

2. The Statute did not provide against Inconveniences or Mischiefs which were not at the time of making the Statute, but against those which were. But at the making of it there could be no Remainder in tayl, because all Estates, which are Estates tayl since the Statute, were Fee-simples Conditional before the Statute, upon which a Remainder could ^{Post 369.} not be limited.

So is Sir Edward Coke in his Comment upon the Statute de Cok. part. 2. Donis, The Formedon in Reverter did lye at Common Law, but ^{f. 336.} not a Formedon in Remainder upon an Estate tayl, because it was a Fee-simple Conditional, whereupon no Remainder could be limited at Common Law, but after the Statute it may be limited upon an Estate tayl, in respect of the Division of the Estates.

3. The Statute formed a Writ of Formedon in the Descender for the new Estate tayl created by the Statute, and mentions a Formedon in the Reverter, as already known in the Chancery, for the Donor, for whom the Statute likewise intended to provide, but formed or mentioned none for the Remainder in tayl.

And the Cases are common in Littleton, and in many other Litt. Sec. 716. Books, that the warranty of Donee in tayl, is Collateral to ^{718, 719.} him in the Remainder in tayl, and binds as at the Common Law.

ther, and thereby make the Fathers warranty lineal to her, but only because her Brother died without Issue male.

That which deceived Sir Edward Coke to admit this Case as he hath painted it, was a deprav'd French Copy thus, Si non frere devyast sans Issue male, which truly read, should be, Si son frere devyast; and the Translation should be, Not unless the Brother dye without Issue male, but, If her Brother dye without Issue male.

Another reason is that his French Copy was deprav'd, Because the French of it is, Si non frere devyast sans Issue male, which is no Language, for that rendered in English, is, Unless Brother dye: For it cannot be rendered as he hath done it, unless the Brother dye, without the French had been, Si non le frere devyast, and not Si non frere devyast.

Sir Edward Coke's first Edition of his Littleton, and all the following Editions, are alike false in this Section. I have an Edition of Littleton in 1604. so deprav'd which was long before Sir Edward Coke publish'd his; but I have a right Edition in 1581. which it seems Sir Edward Coke saw not, where the Reading is right, Si son frere devyast sans Issue male: Therefore you may mend all your Littletons, if you please, and in perusing the Case, you will find the grossness of the false Copies more clearly than you can by this my Discourse of it.

And after all, I much doubt whether this Case, as Littleton is commonly understood, that is, That this lineal warranty doth not bind the Daughter without Asses descending, be Law; my reason is, for that no Issue in tayl is defended from the warranty of the Donee, or Tenant in tayl, but such as are inheritable to the Estates intended within that Statute, and no Estates are so intended but such as have been Fee-simple Conditional at the Common Law.

And no Estate in Remainder of an Estate tayl, that is of a Fee Conditional, could be at Common Law. Art. 367.

All Issues in tayl, within that Statute, are to claim by the Writ there purposely formed for them, which is a Formedon in the Descender, not in Remainder.

3. A third thing to be cleared, is, That the Statute de Donis doth not intend to preserve the Estate tayl for the Issue, or the Reversion for the Donor absolutely against all warranties that might bar them, but only against the Alienation, with, or without warranty of the Donee and Tenant in tayl only; for if it had

remaneat post eorum obitum, vel ad donatorem, vel ad ejus haeredes, si exitus deficiat, revertatur. Per hoc quod nullus sit exitus omnino, vel si aliquis exitus fuerit, & per mortem deficiet, haerede de corpore hujusmodi exitus deficiente.

1. By these words the Donee or Tenant in Tayl is restrained from all power of alienation, whereby the Lands entail'd may not descend to the Heir in Tayl after his death.

Therefore,

By these words he is restrained from alienation with warranty, which doubtless would hinder the Land so to descend, if it were not restrained by the words of the Statute.

2. By the same words the Donee in Tayl is restrained from all power of alienation, whereby the Land entail'd may not revert to the Donor for want of Issue in Tayl.

Therefore,

By those words he is restrained from such alienation with warranty, whereby the Lands may not revert to the Donor, or his Heirs, for want of Issue in Tayl.

For the same words of the Statute must be of equal power and extent to restrain the Donees alienation from damaging the Donor, as from damaging the Issue in Tayl. Otherwise,

3. Words in an Act of Parliament, That A. should have no power to hurt the right of B. nor the right of C. must signify that A. shall have no power to hurt the right of B. but shall have some to hurt the right of C. which is that A. by his warranty shall not harm B. but may by his warranty harm C.

4. If it be said, The Statute restraining not the alienation by warranty as to the Issue in Tayl, the Issue would have no benefit by the Statute; for it is as easie for the Donee or Tenant in Tayl to alien with warranty (and so to deprive the Issue of all benefit of the Statute) as to alien without warranty.

But his warranty can seldom descend upon the Donor, and Post 373. therefore cannot be so hurtful to him as to the Issue in Tayl. How both this satisfie the equal restraint of the Statute from harming the Donor or the Issue in Tayl? For,

This Logick and Reasoning is the same as to say, A. by express words is restrained from beating B. or beating C. but A. hath more frequent opportunities of beating B. than of beating C. Therefore the same words restrain A. from beating B. at all.

But

Donor, to whom his warranty can never be but Collateral, as it can never be but Lineal to the Issue in tayl.

And if it be necessarily understood and implied in the Statute, the operation must be the same as if it had been syllabically inserted in the Statute.

Then to say by the restraint of the Statute, the Donees have not power to alien the Land intayl'd, quo minus ad exitum illorum remaneat post eorum mortem; but they have power to alien quo minus ad donatorem revertatur deficiente exitu, is to make the Statute contradictory to it self; which saith,

Non habeant de cætero potestatem alienandi quo minus ad exitum illorum remaneat vel ad donatorem, vel ejus hæredes revertatur deficiente exitu.

6. Again, if the Statute had provided only for Indemnity of the Issue in tayl, omitting the Donor and his Heirs, by the words, Non habeant de cætero potestatem alienandi quo minus Tenementum sic datum ad exitum illorum remaneat post obitum eorum. The Donees warranty had been restrain'd (as it is) to bar the Issue.

And if it had only provided for the Indemnity of the Donor and his Heirs, omitting the Issue, by the words, Non habeant potestatem alienandi quo minus Tenementum sic datum ad Donatorem vel ad ejus hæredes revertatur deficiente exitu, must not his warranty have been restrain'd from barring the Donor and his Heirs in like manner?

Why then the restraint reaching to both (Issue and Donor) must not both have like benefit of it?

And for further Answer to that thin Objection, That the Statute did not provide against the Donees warranty, falling on the Donor or his Heirs, because it can fall on them but seldom, and that Laws provide against illi quæ frequentius accident. Ant. 371.

It is true, when the words of a Law extend not to an inconvenience rarely happening, and do to those which often happen, it is good reason not to strain the words further than they reach, by saying it is *casus omissus*, and that the Law intended quæ frequentius accident.

But it is no reason, when the words of a Law do enough extend to an inconvenience seldom happening, that they should not extend to it as well as if it happened more frequently, because it happens but seldom. For,

But the right Answer had been, That it was the warranty of the Ancestor, descending upon the Heir, and was not restrained within the Statute de Donis, and therefore must bind him in the Remainder of Common Course.

So as the Doctrine of the binding of Lineal and Collateral warranties, or their not binding, is an Extraction out of mens brains, and Speculations, many scores of years after the Statute de Donis.

And if Littleton (whose memory I much honour) had taken that plain way in resolving his many excellent Cases in his Chapter of warranty, of laying the warranty of the Ancestor doth not bind in this Case, because it is restrained by the Statute of Gloucester, or the Statute de Donis, and it doth bind in this Case, as at the Common Law, because not restrain'd by either Statute (for when he wrote there were no other Statutes Post 377. restraining warranties, there is now a third 11 H. 7.) his Doctrine of warranties had been more clear and satisfactory than now it is, being intitiated under the terms of Lineal and Collateral; for that in truth is the genuine Resolution of most, if not of all his Cases: for no mans warranty doth bind, or not, directly, and a priori, because it is Lineal or Collateral; for no Statute restrains any warranty under those terms; from binding, nor no Law institutes any warranty in those terms, but those are restraints by consequent only from the restraints of warranties made by Statutes.

Objections.

On the other side was urg'd Sir Edward Coke's Opinion upon Sect. 712 of Littleton, and his Comment upon the Statute de Donis (which is but the quoting of his Littleton) where his words are,

The warranty of the Donee in tayl, which is Collateral to the Donor or him in Remainder being heir to him, doth bind them without any Assets: for though the Alienation of the Donee, after Issue, doth not bare the Donor (which was the Mischief provided for by the Act) yet the warranty being Collateral, doth bare both of them, because the Act restrains not that warranty, but it remaineth at Common Law.

the Collateral warranty must barr the Donor without Assets, who demands a Fee-simple. But

Littleton's words end not there, but immediately follow, Except in Cases which are restrain'd by the Statutes, in the plural number; which words taken in, as Littleton's Case is, make his Authority directly for me.

For when Littleton wrote, there were but two Statutes which restrain'd any warranty from binding, as at Common Law, namely the Statute of Gloucester, and Westminster the second, de Donis; now there is a third, 11 H. 7. c. 20.

So as those words of Littleton are the same as if he had said, Except in Cases restrain'd by the Statutes of Gloucester and Westminster the second, de Donis.

Whence it follows; That by Littleton both Statutes did restrain some Collateral warranties, but the Statute de Donis restrains no other than the Collateral warranty of the Donee descending upon the Donor, it leaving all other Collateral warranties as at the Common Law. Ergo it doth restrain that, which is the solution of the Question, and according to Littleton.

I have examined several Editions of Littleton, and the words are the same in all, Si non in Cases restrained per les Statutes.

No man will say, that by those words, Except in Cases restrained by the Statutes, Littleton meant Statutes that were not then made, nor perhaps never would be.

For that were to make him say in instructing his Son (for, and to whom he wxit his Books) what the Law was.

But a Collateral warranty doth bind both for Fee and Fee-tayl, except in Cases restrain'd by Statutes, yet to be made, and which perhaps never will be made: Besides the words restrain'd per les Statutes by the Statutes, always denote Statutes which signally are, and not which are not.

3. The third Objection was from Littleton, Sect. 716. where it is shewed the Collateral warranty of Tenant in capi doth bind him in Remainder in tayl, which is agreed; for Post 381. the Statute de Donis restrains not the warranty of Donee in tayl descending upon him in Remainder, as hath been clear- ed.

4. The fourth Objection was the Case of 41 Ed. 3. Fitz. t.c. Garranty pl. 16. whence it was urg'd as Justice Herles Opinion, and by him Spoken.

1. That

the mischief of the Statute, but gave no Rule, but the Debate was adjourn'd.

Another Reason proving this, is, That it is said, Herle que fuit un Justic, which no Reporter ever said of a Justice at present, and reporting his Opinion.

That Finchden said is grounded upon what he had heard was said by Herle in former terms. But no such Opinion of Herle's appears any where, but the contrary clearly in several places.

The Reporter, at the end of the Case, hath vid. 5 E.3. O. ^{Fitz. Garan-} 2 E.3. f. 34.
pinion Herle que le warranty le Ten. in tayl, n'est pas barr al do-
nor pour ceo que le statut reherse le mischief quod Donatores u-
erunt exclusi de Reversionibus hucusque, & les heires disherit, issint
a restrainer tiel point fuit le stat. de Donis Conditionalibus fait
quod voluntas donatoris observetur. Here is Herle's own Opti-
tion expressly contrary to what Finchden by hearsay only saith
it was.

In another Case upon question, Whether the warranty of Ten-
ant in tayl barr'd him in Remainder? Herle saith, Le statute voet ^{Fitz. 7 E. 3.} f. 48. p. 46.
que ceux as queux les Tenements sont done, ne eient power de a-
lienation quo minus il descendra al Issue, ou retorn al Donor, & in
ceo point le statute voet que le volunt del donor in omnibus obser-
vetur, mes le statute ne parle riens de cestuy in le Remainder, and
so rul'd.

Here is the Opinion of Herle in another Case, That the
warranty of the Donee in tayl barr'd not the Issue in tayl, nor
the Donor, by the Statute, but barr'd him in Remainder, as
not alived by the Statute.

In a question, Whether the King were barr'd by the warran- ^{Fitz. p. 61.}
ty of Tenant in tayl, his Ancestor for a Reversion descended to ^{Garranty.}
him, with Assets? Herle gives his Opinion as known Law
then, Vous savez bien que de ley cestuy que demand per Forme-
don in Reverter, ne sera barr per le garranty, cestuy a que les Ten-
ements fuerunt done in tayl, sil ne eyt per descent, tout soit il heire
a luy, & le quel Roy ad per descent ou non, ne poiomus enquire.
And on this Case Sir Edward Coke makes an Observation,
That the King was not bound by a Collateral warranty for
the Reversion of an Estate in tayl, no more is any other Donor,
by that Case.

6. A sixth Objection was made from a Case 27 E. 3. f. 83. ^{27 E. 3. f. 83.} _{Pl. 42.} of a Formedon in Reverter brought, and the Deed of Tenant in tayl, Ancestor to the Demandant, shewed forth, but the Book mentions no warranty; but it is like it was a Deed with warranty, and the Plaintiff durst not demurr, but traversed the Deed, as any would avoid demurring upon the validity of an Ancestor's Deed, when he was secure, there was no such Deed of the Ancestor.

7. The last Objection was a Case 4 E. 3. f. 56. p. 58. where ^{4 E. 3. f. 56.} Tenant in tayl made a feoffment with warranty, and the ^{Pl. 58.} warranty descended upon him in the Remainder in tayl, which bar'd him, which is a Case agreed, as before: For the Statute Act. 377. of Westminster the second, provides not at all for him in Remainder; but as to him, Tenant in tayl's warranty is left as at Common Law.

In 4 E. 3. a Formedon in the Descender was brought by the ^{4 E. 3. f. 28.} Issue in tayl, and the Release of his elder Brother, with ^{Pl. 57.} warranty, was pleaded by the Tenant Stoner, who gave the Rule in the Case: Le statut restraynes le power del Issue in tayl, to alien in prejudice of him in the Reversion, by express words, and a Fortiori, the power of the Issue in tayl is restrain'd to alien in prejudice of the Issue in tayl.

Whereupon the Tenant was rul'd to answer, and pleaded Assets descended.

Here it was admitted, the Issue in tayl could not alien with ^{10 E. 3. f. 14.} warranty in prejudice of the Reversioner: And in 10 E. 3. soon ^{Pl. 53.} after a Formedon in Reverter being brought, and the warranty of Tenant in tayl pleaded in bar, Scot alledg'd the restraint of the Statute as well for the Reversioner as for those claiming by descent in tayl. The same Stoner demanding if the Ancestor's Deed was acknowledge'd, and answered it was; His Rule was, That the Judgment must be the same for the Reversioner as for the Issue, in these words, Ore est tout sur un Judgment, which can have no other meaning, considering Scot's words immediately before, that the Law was the same for the Reversioner, as for the Issue in tayl, and Stoner's Opinion in the Case before to the same effect, 4 E. 3.

Yet if a Court give Judgment judicially, another Court is not bound to give like Judgment, unless it think that Judgment first given was according to Law. HobbsLeviath. 144.

For any Court may err, else Errors in Judgment would not be admitted, nor a Reversal of them.

Therefore, if a Judge conceives a Judgment given in another Court to be erroneous, he being sworn to judge according to Law; that is, in his own conscience ought not to give the like Judgment, for that were to wrong every man having a like cause, because another was wrong'd before, much less to follow extra-judicial Opinions, unless he believes those Opinions are right.

The other Case is in Croke, 5 Car. Salvin versus Clerk, in Eject-
ment upon a special Verdict; Alexander Sidenham Tenant in tayl
to him and the Heirs males of his body, the Reversion to John
his eldest Brother, made a Lease for three Lives, warranted by
the Statute of 32 H. 8. c. 28. with warranty; And after 16 Eliz.
levies a Fine with warranty and proclamations to Taylor, and
dies without Issue male, leaving Issue Elizabeth his Daughter,
Mother to the Plaintiff's Lessor. In 18 Eliz. the Lease for Lives
expired. In 30 Eliz. John the elder Brother died without Issue,
the said Elizabeth being his Niece and Heir. The Defendant
entered, claiming by a Lease from Taylor, and Points entered up
on him as Heir to Elizabeth. Cro. Car. 156.
1 Jones 208.

A question was mow'd upon a suppos'd Case, and not in fact
within the Case, Whether if the Fine had not been with procla-
mation (as it was) and no Non-claim had been in the Case (as
there was) this warranty should make a discontinuance in Fee,
and bart Elizabeth, it not descending upon John after Alexander's
death, but upon Elizabeth, who is now also John's Heir, or deter-
mined by Alexander's death.

The Judges were of opinion; as the Reporter saith, That the
warranty did bart Elizabeth, and consequently her Heir, because
the Reversion was discontinued by the Estate for Lives, and a new
Fee thereby gain'd, and the Reversion displace'd thereby, and the
warranty was annex'd to that new Fee. But this Case is all
false, and mis-reported.

1. For that it saith the Lease for Lives was a discontinuance of
the Reversion, & thereby a new Fee gain'd to Tenant in tayl, which
he passed away by the Fine with warranty, which could not be; for
in the Case it appears the Lease was warranted by the Stat. of 32 Con. Cro. Car.
H. 8. and then it could make no discontinuance, nor no new Fee of 156. 1 Jones.
a Reversion could be gain'd, and then no Estate to which the war-
ranty was annex'd, and so was it resolv'd 40 Eliz. Keen
& Copes C. 208, 209.
40 Eliz. Keen
602. pl. 12.

D d d 2

2. That

the Warrantor, such Estate as was first warranted, and no other, unless a fee be granted with warranty only for the life of the Grantee or Grantor, in which Case the Grantee, upon voucher, recovers a fee, though the warranty were but for life.

I shall likewise agree the Law to be as Sir Edward Coke saith in both places, if his meaning be that the Tenant in possession, when he is impleaded, may rebut the Demandant, without shewing how he came to the possession which he then hath, when impleaded, be it by disfief, abatement, intrusion, Post, &c. or any other tortious way: And for the reason given in Lincoln Colledge Case, That it sufficeth that the Tenant defend his possession: But if his meaning be, that the Tenant in possession need not shew that the warranty ever extended to him, or that he hath any right to it, then I must deny his Doctrine in Lincoln Colledge Case, or in Littleton, which is but the former there repeated to be Law.

For as it is not reasonable a man should recover that Land which he hath once warranted to me, from me, what title soever I have in it at the time when he impleads me:

So on the other side, it is against reason I should warrant Land to one who never had any right in my warranty. And the same reason is if a man will be warranted by Rebutter, he should make it appear how the warranty extends to him, as if he will be warranted by Voucher; for the difference is no other, than that in the case of Voucher a stranger impleads him, in case of Rebutter, the Warrantor himself impleads him, and in a Voucher he must make his title appear to be warranted, Ergo in a Rebutter. But he needs not have like Estate in the Land upon a Rebutter as upon Voucher, which is the reason given of recovering in value.

And the only reason why the person, who is to warrant, impleading the Tenant of the Land, shall not recover, but be rebutted by the warranty, is because if he should recover the Land, the Tenant, who is intitled to the warranty, must recover in value from him again, and therefore to avoid Circuit of Action, he shall not recover, but be rebutted and barr'd, as is most reasonable.

I shall therefore first make it appear by all ancient Authorities, That the Tenant in possession shall not rebut the Demandant by the warranty, without he first make it appear that the warranty did extend to him as Heir or Assignee.

To

My next Assertion is, That the Tenant in possession setting forth how the warranty extends to him, needs not set forth by what Estate or Title he is in possession.

To this I shall cite three Books full in the point.

But in all these Cases it is to be noted, That the Tenant rebutting, though he was in possession of another Estate than that to which the warranty was annex'd; yet constantly shew'd how the warranty was deriv'd to him, which Sir Edward Coke ⁴⁵ E. 3. observ'd not, either in Lincoln Colledge Case, or his Littleton, but cites in Lincoln Colledge Case the Case of 45 E. 3. and some ⁴⁵ E. 3. f. 18. others I shall mention after, to shew a man may rebut, being in of another Estate than that which was warranted, which is true, but not without intitling himself to the warranty.

That the Law of rebutting stands upon the difference I have taken, besides the Authorities urg'd, will be evident for these Reasons.

As a warranty may be created, so may it be determin'd or extinguish'd various ways.

1. It may be releas'd, as Littleton himself is Sect. 748.
2. It may be defeasanc'd, as Sir Edward Coke upon that Sect. 748.
3. It may be lost by Attainer, Sect. 745.
4. It may be extinguish'd by Re-feofment of the warrantor or his Heirs, by the Garrantee or his Heir.

In all these Cases, if the warranty be destroy'd, it cannot be rebutted; for there cannot be an accident to a thing which is not; and rebutting is an accident incident to a warranty: And therefore if the warranty have no being, there can be no rebutter.

Why then admit A. warrants Land to B. and his Assigns, during the life of B. after B. releases this warranty to A. and then Assigns to C. C. is impleaded by A. and pleads generally that A. warranted to B. for his life, and that B. is still living, if C. could rebut A. by this manner of pleading, without shewing when B. assigned to him, so to derive the benefit of the warranty to himself, A. could never have benefit of the Release of the warranty, because it could not appear whether the warranty were releas'd before or after the Assignment; if before, then the warranty is gone, and cannot be rebutted, but if after, it may.

The Case of 7 E. 3. was, That Land was given in tayl, and the Donor warranted the Land generally to the Donee, his Heirs and Assigns, the Donee made a Feoffment in Fee, and died without Issue; and the Donor impleading the Feoffee was rebutted, because he had warranted the Land to the Donee, his Heirs and Assigns, and the Feoffee claimed as Assignee of the Donee, and therefore rebutted, not because he had a bare possession. But this Judgment of 7 E. 3. Sir Edward Coke denies (and perhaps justly) to be Law now, because the Estate tayl being determin'd to which the warranty was first annex'd, the whole warranty determin'd with it.

But however, the Case no way proves what it is alledg'd for in Lincoln Colledge Case, That a man may rebut without ever shewing the warranty, extended to him, for the Feoffee did in that Case shew it: So in the Case 43 E. 3. f. 18. the Feme, who rebutted, shew'd she was Grantee of the warranty.

To this may be added, That what is deliver'd, as before, in Lincoln Colledge Case, is neither conducing to the Judgment given in that Case, nor is it any Opinion of the Judges, but is Mod. 192. Sir Edward Coke's single Opinion, emergently given, as appears most clearly in the Case.

To conclude,

When the Feoffees were leas'd to the use of William Vesey for his life, and after to the use of the Defendant, his wife, for her life, and after to the use of the right Heirs of William Vesey:

And when by Operation of the Statute of 27 H. 8. the possession is brought to these uses, the warranty made by Mod. 182. William Vesey to the Feoffees and their Heirs, is wholly destroyed.

For if before the Statute the Feoffees had executed an Estate to William for life, the Remainder to his wife for life, the Remainder to his right Heirs;

The warranty had been extinguish'd by such Execution of Estate, and releas'd in Law, for it could be in none but in William and his Heirs, who could not warrant to himself, or themselves, by Littleton Sect. 743. for his Heirs, in such Case, take not by Purchase, but Limitation, because the Freehold was in him with a Remainder over to his right Heirs, and so hath as great an Estate in the Land as the Feoffees had, and then the warranty is gone by Littleton.

Litt. Sect. 744.

See

And

The first of this kind I shall name, is Tenant by the Court. ^{Ass. p. 9. 35.} sie, who, as was adjudg'd 35 Ass. might rebut the warranty made to his wishes Ancestor; yet was neither Heir nor formal Assignee to say to whom the warranty was granted; nothing is said in the Book concerning his vouching, but certainly the Inheritor may be receiv'd to defend his Estate, if impleaded by a stranger, who may vouch according to the warranty, or may rebut, as the Case of 45 E. 3. f. 18. is.

But this difference is observable also, where such a Tenant rebuts, it appears what claim he makes to the warranty, and so the Inconveniences avoided which follow a Rebutter made up on no other reason than because he who rebuts is in possession of the Land warrantied.

A second Tenant of this kind is the Lord of a Villain, and therefore the Case is ^{Mod. 193.} 22 Ass. That Tenant in Dower made a Lease for life to a Villain (which in truth was a forfeiture for making a greater Estate of Freehold than she had power to make) and bound her and her Heirs to warranty; the Lord of the Villain entred upon the Land in her life time, and before the warranty attach'd the Heir, who had right to enter for the forfeiture, the Mother died, and the Heir entred upon the L. of the Villain, who re-entred, and the Heir brought an Assize. The L. of the Villain pleaded the warranty, and that the Heir, if a stranger had impleaded him, was bound to warrant the Estate, and therefore demanded Judgment if the Heir himself should implead him.

1. It is there agreed, if the warranty had attach'd the Heir before the Lords entry, the Heir had been bound; but quare.

2. By that Book it seems the Lord, impleaded by a Stranger, might have vouch'd the Heir, if the warranty had attach'd him before the Lords entry.

But in this Case it appears, the Lord was no formal Assignee of the Villains, for this warranty must be as to an Assignee (for the Estate warranted was but for life) and the Lords Estate was only by order of the Law.

A third Case of this nature is, where the Ancestor granted Lands to a Bastard, with warranty; but how far the warranty extended, as to the Heirs, or Heirs and Assigns of the Bastard, appears not in the Case. The Bastard die'd without Issue, and consequently without Heir, the L. by Escheat entred, upon whom the Heir entered, the warranty of his Ancestor having not attach'd him before the Bastards death (for it seems this was in a Case where the Heir might have entered in his Ancestors life time, & so aboven his warranty, as in the former case of the L. of a Villain) by the Book

try made by either Lord, the Lords could have rebutted or vouch'd by reason of those warranties, being in truth strangers to the warranty, and not able to derive it to themselves any way.

But if after the warranty descended upon the Villain or Bastard, the Villain or Bastard had been impleaded by the Heir, and had pleaded the warranty against the Heir, and had Judgment thereupon by way of Rebutter, then the Lords might have plead'd this Judgment as conclusive, and making the Villain's Title, or Bastard, good against the Heir, and the Heir should never have recover'd against the Lords. And this seems the meaning of the Book 22 Ass. p. 37. if well consider'd. Though in Spirt and Bences Case no such difference is observ'd.

Cætera defiderantur.

The Court was in this Case divided, *viz.* The Chief Justice and Justice *Archer* for the Defendant, and Justice *Wyld* and Justice *Atkins* for the Tenant.

CONCERNING PROCESS

Out of the
Courts at WESTMINSTER

INTO

WALES

Of late times, and how anciently.

2 Saund. 193.
2 Modern. 10.
3 Keb. 170.

Memorandum.
These Notes
following
were all
wrote with
the proper
hand of the
Chief Justice
Sir John
Vaughan, and
intended to
be methodi-
sised by him,
in order to
be delivered
in Court.

A Man taken upon a *Latitas* in *England*, puts in two Welch men for his Bayl, Judgment passing against him, it was a Question, Whether after a Capias ad Satisfaciendum issued against the Principal, who was not to be found, Process might issue into Wales, which must be by *Scire facias*, first against the Bayl; whereupon Mann the Secondary of the Kings Bench informed the Court that it had been so done in like Cases many times.

But the Court was likewise informed, that Brownloe, Chief Pronotary of the Common Pleas, affirmed they did not then use to send such Process into Wales, but only Process of Outlawry.

10 Jac. 2.
2 rods part 2.
f. 54, 55. Hall
and Rother-
rams Case.

Post 397, 414.

But

Per Doderige, *If Debt be brought against one in London, and after the Defendant removes, and inhabits in Wales, a Capias ad satisfaciendum may be awarded against him into Wales, or into any County Palatine, and this was his Opinion exactly in the former Case.*

But as the course of the Common Pleas was alledged to be contrary to what Mann said was used in the King's Bench, in the Case of Hall & Rotheram, 10 Jac. before cited, so

It was in the same year 11 Jac. wherein the Kings Bench resolved, *That Execution did well issue to the Sheriff of the County of Radnor of a Recovery in Debt in the Kings Bench, and fin'd the Sheriff for his Return, that breve Domini Regis non currit in Wallia.*

Resolved otherwise in the Common Pleas, and that by the whole Court, *That a Fieri facias, Capias ad Satisfaciendum, or other Judicial Process did not run into Wales, but that a Capias utlagatum did go into Wales; and as Brownloe, Pronotary, then said, that an Extent hath gone into Wales.*

And it is undoubtedly true, as to the Capias utlagatum and Extent, but as to all other Judicial Process into Wales, upon Judgments obtained here between party and party, hitherto there is nothing to turn the Scale: The Judgment of the Court of Common Pleas being directly contrary to that of the Kings Bench in the same age and time.

Upon occasion of a Procedendo moved for to the Council of the Marches, who had made a Decree, *That some persons living in the English Counties, where they at least exercised Jurisdiction, should pay monies recovered against him at a great Sessions in Wales, he having neither Lands or Goods, nor inhabiting in Wales, having obtained a Prohibition to the Council of the Marches, the Court of the Kings Bench was against the Procedendo. And Justice Jones cited a Case where Judgment was given in the great Sessions of Cardigan, against a Citizen of London, who then inhabited there, and after removed his Goods and Person thence, that up, on great deliberation it was resolved, A Certiorari should issue out of the Chancery to remove the Record out of Wales, and that then it should be sent by Mitisimus into the Kings Bench, and so Execution should be awarded in England of the Judgment had in Wales. If this were so, for which there is no other Authority but that Justice Jones cited such a Case, not mentioning the time, I agree it would seem strange, that a Judgment obtained in Wales should by Law be executed in England, and that a Judgment obtained in England, could not be executed in Wales.*

fff

But

16 Jac. B. R.
Croke 484

11 Jac. God-
bolt f. 214.
2 Saund. 193.
Ant. 395.
Post 414

Bendloes
Rep. 2 Car. 1.
Term. Mich.
f. 192. Beatons
Case.

No time is
mentioned
when this Re-
solution, ci-
ted by Jones,
was, so as it
probably
preceded the
Resolutions
of the Judges
in Croke.

No^t are Presidents of fact, which pass sub silentio in the Stat. Tract. Court of Kings Bench or Common Pleas, in such Cases to be ^{240.} regarded.

For Processes issue out of the Offices regularly to the Sheriffs of the County, whereupon the Cestator, the Person, Goods, or Lands, are said to be without distinction of places within or without the Jurisdiction of the Court, if the name of the County be familiar to them, as those of Wales are, but not those of Ireland.

We must then look higher, and search for surer Premisses than those late Awards of the Courts at Westminster, to determine this Question.

And first it must be agreed, That when Wales was a Kingdom, or Territory governed by its own Laws, and the people subject to a Prince peculiar to themselves immediately, and not to the Crown of England, no Process, of any nature, could issue thither from the Courts of England, more than to any other Foreign Dominion that is not of the Dominion of England.

In which Assertion I neither do, nor need affirm any thing, Whether Wales were held from the Crown of England by Feodal Right, or not? and what sort of Liegeance the Princes of Wales, and from what time, did owe to the King of England? For whatever that was, yet Wales was governed by its own Laws, and not bound by any Law made in England to bind them more than Scotland was, when yet the King of Scotland did homage to the King of England for that very Kingdom of Scotland.

I begin then with the time that Wales came to be of the Dominion of the Crown of England, and was obliged to such Laws as the Parliament of England would enact purposely to bind it.

This was not before the entire subjection of Wales (de alto & basso) as the words of the Statute of Rutland are to King E. I. which a little in time preceded the making of those Laws for Wales, called the Statute of Rutland.

Whether it was really a Statute by Parliament, or concession of the King by his Charter, for the future Government of Wales is not material (so so at least it appears to be)

present by Laws appointed and made by the King's Letters Patents, and the King's Writs Original or Judicial from the Courts of Westminster go not there; so anciently were Gascoign, Guyen, Calais of the Dominions of England, but governed by the Customs and Laws used there, and out of the Jurisdiction of the Kings Courts.

And it is observable, That these Territories of France were not held by the Crown of England by that right it had to all France (as is much mistaken) and particularly by Sir Edward Coke in Calvin's Case: For those Territories, by an Act and Conclusion of Peace made by E. 3. with the French, which was ratified by the Parliaments of both Kingdoms, those Territories were then annexed thereby to the Dominion of the Crown of England; whereof I had a fair and ancient Copy from Mr. Selden, but lost it by the fire.

And that Gascoign, Guyen, and Calais were of the Dominions of England and Ireland, appears by the Book 2 R. 3. f. 12. Ant 291.

But to all Dominions of Acquisition to the Crown of England, some Writs out of the King's Chancery have constantly run.

Sir Edward Coke, in Calvin's Case, calleth them Brevia mandatoria & non remedialia, distinguishing Writs into Brevia mandatoria & remedialia, & Brevia mandatoria non remedialia: The first sort, he saith, never issue into Dominions belonging to England, but not parts of it; the other do.

More intelligible it may be said, That Writs in order to the particular Rights and Properties of the Subject (which he calls Brevia mandatoria remedialia) for this Writ is a Mandate, issue not to Dominions that are no part of England, but belonging to it: For surely, as they have their particular Laws, so consequently they must have their particular Mandates or Writs in order to them.

And though their Laws should by accident be the same with those of England, as hath happned to Ireland some times, and now to Wales, yet the Administration of them is not necessarily by and under the Jurisdiction of the Courts of England.

Brevia mandatoria, & non remedialia, are Writs that concern not the particular Rights or Properties of the Subjects, but the Government and Superintendency of the King, Ne quid Respublica capiat detrimenti, such are Writs for safe Conduct, and protection, Writs for Apprehension of persons in his Dominions of England, and withdrawing to avoid the Law into other of his

2. This Ordinance of Parliament extended not to all Wales, but only to the Lordships Marchers there, nor any way comprehended the ancient Shires of Wales, or Body of the Principality to which the Ordinance of the Statute of Rutland only extended: For Lordships Marchers were out of the Shires, as appears by Statute 27 H. 8.

3. It appears by the Case, that Gower was not within any County at that time.

Another Case to the same purpose is in Fitz-herbert, Title Fitz. Jurisdiction, and not in any other Reports, 13 E. 3. in a Writ ^{dictio} 13 E. of Cosenage, the Demand was of Castle of K. and Commot of J. the Defendant pleaded the Castle and Commot were in Wales, where the King's Writ runs not; and it was said that the word was not intelligible in the Courts of England, and Judgment was prayed if the Court would take Cognizance.

To give the Court Jurisdiction, it was urged pressingly,

1. That they had given the Court Jurisdiction, by alledging the Court knew not what was meant by Commot, which the Court was to determine whether it did or not: Therefore Jurisdiction was admitted therein.

2. Parning pressed they had demanded the view, which gave the Court Jurisdiction.

3. For that the Original was directed to the Sheriff of Hereford, who by his Return had testified the Summons, and the Tenant had appeared, and so affirmed the Summons.

4. For that the view was had: Notwithstanding all which, to give the Court Jurisdiction, it was said to Parning, He must say more before the Court would have Jurisdiction. Which evidently proves that the Court had no Jurisdiction generally of Land in Wales, as I observed from the former Case. And no 2 Mod. 197, act of the party gives Jurisdiction to the Court, by elapsing his 273. 1 Mod. time to plead to the Jurisdiction, if it appear by the Record the 81. Keil. 55. a. Court hath no Jurisdiction, as in this Case it did. 1 Vent. 236, 369.

Then Woodstock said, Though the Castle and Commot were in Wales the Court ought not to be out of Jurisdiction, for by Commot a great Signiory was demanded, consisting of Lands, Rents and Services, and that the Castle and Commot were held in Capite of the King, as of his Crown, and said, those so held were to be impleaded here, and not elsewhere, so is 7 H.6. f. 36. b. 7 H.6.f. 36. b.

There were two ways by which alteration might be wrought : The first by Act of Parliament in England, making Laws to change either the Laws or Jurisdictions of Wales, or both.

The second, by Alterations made in the Laws formerly by him established by E. I. himself, and perhaps by his Successors, Kings of England, without Parliament, by a Clause contained in the Close of that Statute or Ordinance, called Statutum Wallie, in these words :

Et ideo vobis Mandamus quod præmissa de cætero in omnibus observetis, ita tantum quod quotiescumque, & quandocunque, & ubicunque nobis placuerit possumus prædicta Statuta, & eorum partes singulas declarare, interpretari, addere sive diminuere pro nostræ libito voluntatis, prout securitati nostræ & terræ nostræ prædictæ viderimus expediri. This seems to extend but to the person of E. I. and not to his Successors ; and however, no such change Post 409. was made by him or his Successors.

But the first remarkable Alteration made, seems to have been by Act of Parliament, and probably in the time of E. I. who reigned long after the Statute of Wales, but the Act it self is no where extant, that I could learn. But great Evidence that such there was, which in some measure gave a Jurisdiction to the Kings Courts of England in Wales, not generally, but over the Lordships Marchers there.

This appears clearly by a Case, not much noted nor cited Fitz. A. C. 18 E. by any that I know, to this purpose, being out of the printed 2. pl. 382. Year-Books, but printed by Fitz-herbert out of the Reports he had of E. 2. as he had of E. I. and H. 3. all which we want wholly, though some Copies are extant of E. 2. which Case is the only light that I know to clear the Question in hand.

An Assise of Novel Disseisin was brought against C. de liberato tenemento in Gowre, and the Writ was directed to the Sheriff of Gloucester, and the Plaintiff was made of two Commots, which is mis-printed Commons, and comprehends all Gouers-land, now part of the County of Glamorgan, by 27 H. 8. but was not so then, the Assise pass against the Tenant, before the Justice assigned to take Assises in the Marches of Wales.

The Tenant brought his Writ of Error and Assizes for Error.

1. That the Writ was directed to the Sheriff of Gloucester, and the Land put in view was in Wales.

2. That

2. This Ordinance of Parliament extended not to all Wales, but only to the Lordships Marchers there, nor any way comprehended the ancient Shires of Wales, or Body of the Principality to which the Ordinance of the Statute of Rutland only extended: For Lordships Marchers were out of the Shires, as appears by Statute 27 H. 8.

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This is not strange that Acts of Parliament are lost sometimes; Note Ante the Act of 3 E. 1. by which old Customs were granted, not extant, but clear proofs of it remain.

These three last Cases therefore, wherein the Tenants were impleaded in the Courts here for Land in Wales; and Summons and Execution made by the Sheriff of the next adjoining County, are well warranted by an Act of Parliament not extant, being for either the Lordships Marchersthemelves, or some part of them, and against the Lord himself, as that Case of 18 E. 2. expressly resolves.

All these were real Actions: The first an Assize of Novel Disseisin; the second a Writ of ~~Co~~senage; the third a Writ of Dower.

The like Case is cited 19 H. 6. That when the Manner of A-^{19 H. 6. f. 12. A.}bergavenny was demanded, the Writ was directed to the Sheriff of Hereford, as Newton urged, for this was a Lordship Mar-cher, and held of the King in Capite, as appears by Moor's Reports in Cornwals Case, in that the Barony of Abergavenny was held by the Lord Hastings of the King in Capite, to defend it at his charge, ad utilitatem Domini Regis.

Exactly agreeing with this Doctrine is the Book of 21 H. 7. ^{21 H. 7. f. 33. B.} f. 33. b. if a Signiory in Wales be to be tryed, it shall be tryed here by the Course of the Common Law; but if Lands be held of a Signiory in Wales, it shall be tryed within the Manner, and not elsewhere.

As for that expression, by the Course of the Common Law, it is also in the Book 19 H. 6. that Deeds and all other things al-^{19 H. 6. f. 12. A.} ledged in Wales, shall be tryed in the adjoining Counties at the Common Law, otherwise there would be a failer of Right: and of this opinion seemed most of the Justices, arguendo obiter, the Case before them not concerning Wales, but the County Pa-latine of Lancaster.

Of Churches in Wales a Quare Impedit shall be brought in Eng-land, yet the Land, and other things in Wales, shall be determin-^{30 H. 6. f. 6. B.}ed before the Stewards of the Lords of Wales, if it be not of Lands between the Lords themselves.

There is an ancient Book remarkable to the same purpose, 8 E. 3. Term. speaking of the Common Pleas: This Court hath more Conu-^{Mich. 59.}zance of Pleas of the Welch Shires, than it hath of Pleas of the County of Chester; for the Pleas of Quare Impedits, and of Lands and Tenements held of the King in Chief in Wales, shall be pleaded here, and they shall not be so of the County of Che-ster.

practice or pretence that any such Tryals should be for any Land in these places.

Therefore it is evident, That it was, and it could be no otherwise than by Act of Parliament, that Wales differed from the other Dominions, belonging to England, in these Tryals.

Now was it by any new Law made by E. 1. or any his Successors, by the Clause in the end of the Statute of Rutland, which Ant 403. hath never been pretended: For by that Clause power was given to change Laws simply for Wales, but this way of Tryals changes the Law of England, in order to Tryals for Land in Wales, which that Clause neither doth, nor could warrant.

Besides this new way of Tryals concerning Lordships Marchers held in chief from the King, the Books are full, that in Quare Impedits for disturbance to Churches in Wales, the Summons and Tryal must be by the Sheriff of, and in the adjacent Counties, which is often affirmed and agitated in the Books, but with as much confusion, and as little clearness as the other concerning Land.

To this purpose is the Case before 8 E. 3. the Pleas of Quare Impedits and of Lands and Tenements held in chief of the King in Wales, shall be pleaded there. ^{8 E. 3. 59.} ^{Ant 407.}

A Quare Impedit brought by the King against an Abbot, ex. ^{15 E. 3. Fitz.} Jurisdiction, exception taken that the Church was in Wales, where the Kings Writ runs not, & non allocatur, for the King was party by the Book, as a reason.

A Quare impedit cannot be brought in Wales because a Writ ^{11 H. 6. f. 3. A.} to the Bishop cannot be awarded, for they will not obey it, and ^{B.} so was the Opinion in that Case of Danby, Morton, and New-ton, that Quare Impedits for Churches in Wales must be brought only in the Kings Courts, and the Opinion is there, that the Prince could not direct a Writ to the Bishops in Wales, upon Quare Impedits there brought.

So is the Book of 30 H. 6. of Churches in Wales, a 30 H. 6. f. 6. B. Quare Impedit shall be brought in England; the Case was cited before concerning Tryals of Lands in Wales.

A Quare Impedit was brought in the County of Hereford of a disturbance in Wales to present to a Church, exception was taken by Littleton only to this, that the Plaintiff did not shew in his Count of Writ, that Hereford was the next adjoining County, but by the Book it was well enough, for if Hereford were not the next adjoining County, the Defendant might shew it, but no exception was taken to the bringing of the Writ into the County of Hereford, if it were the next County. ^{35 H. 6. f. 30. A. B.}

Quare

1. **That** only Quare Impedits for Churches in Lordships Marchers in Wales, and not for Churches in the ancient Shires, or of the Principality of Wales, whereof submission and render was made to E. I. were to be brought and tryed in England.

2. **That** Tryals and Writs in England for Land in Wales were only for Lordships Marchers, and not for any Land in Wales, which was of the ancient Principality; for the Lordships Marchers were, or most of them, of the Dominion of England, and held of the King in chief, as appears by the Statute 28 E. 3. c. 2. and by the Title of the Earl of March before the renditon of the Principality to E. I.

That the Law was so for the Quare Impedits appears in the first place by the Book before cited, 11 H. 6. f. 3. where Danby, Martin, and Newton were of Opinion (argued about a Church in Garnsey, for the Case before them was not of a Church in Wales) **That** Quare Impedits for Churches in Wales were to be brought in England, which was true; but not for Churches which were not in any Lordships Marchers. Strange affirms positively Sid. 92. in the same Case, in these words,

It is frequent to have *Quare Impedits* in Wales, and the Bishops ^{Per Strange,} 11 H. 6. f. 3. there do serve the Writs directed to them, which, I my self have often seen. And what he said was most true for Churches within the Principality, as what the other Judges said was also true concerning Churches within the Lordships Marchers, for those Courts had no power to write to the Bishops.

But this is most manifest by the Statute of Wales 12 E. I. **That** the Kings Justiciar there had power within the County where he was Justiciar to write to the Bishops, which the Lords Marchers Sid. 92. could not do.

The words of the Law are upon demand of Dower in Wales before the Kings Justiciar. ^{Stat. Wallie,} f. 17.

Si forte objiciat, quare non debet dotem habere, eo quod nunquam fuit tali quem ipsa vocat virum legitimo matrimonio copulata, tunc mandabitur Episcopo quod super hoc inquirat veritatem, & inquisita veritate certificet Justiciarios Wallie, & secundum certificationem Episcopi procedatur ad Judicium.

It is clear also, **That** the Bishops of Wales, were originally of the Foundation of the Princes of Wales, as is the Book of 10 H. 4. and their Courts did write to their own Bishops as the Courts in England did to the Kings Bishops. ^{10 H. 4. f. 1}

So as an Action brought upon a Bond or Deed made in Wales, Ireland, Normandy, or Dutchland, or upon a matter there alledged, cannot possibly be for want of Tryal; but a Plea in Barr to an Action brought acting there, some question hath been, Whether such a Plea shall not be tryed where the Action is brought? and in such a Case, if the Plea in Barr arise wholly out of the Realm of England, the better Opinion is that such Plea wants a Tryal: See for this 32 H. 6. 25. B. 8 All. pl. 27. d. Dowdales Case, Co. l. 6.

Thus bringing Actions in England and trying them in Countries adjoining to Wales, without knowing the true reason of it; also bringing Quare Impedits in like manner for Churches in Wales, without distinguishing they were for Lands of Lordships Marchers held of the King, and for Churches within such Lordships Marchers, hath occasioned that great diversity and contrariety of Opinions in our Books; and at length that common Error, That matters in *Wales*, of what nature soever, are impleadable in *England*, and to be tryed in the next adjoining County.

When no such Law was ever pretended to be concerning other the Kings Dominions out of the Realm, belonging to the English Crown, of the same nature with Wales, as Ireland, the Isles of Garnsey and Jersey, Calais, Gascoign, Guyen anciently.

Nor could it be pretended of Scotland if it should become a Dominion of the Crown of England, it being at present but of the King of England, though it was otherwise when the King came to the Crown.

And to say that Dominions contiguous with the Realm of England, as Wales was, and Scotland would be, is a thing so simple to make a difference, as it is not worth the answering; for no such difference, was assignable before Wales became of the Dominions of England, and since, the Common Law cannot make the difference, as is observed before,

It remains to examine what other Alterations have been by Act of Parliament, whereby Jurisdiction hath been given to the Courts of England in Wales, without which it seems clear they could have none.

1. And first by Parliament 26 H. 8. power was given to the Kings President and Council in the Marchers of Wales in several Cases.

2. Power was given to indict, outlaw, and proceed against Traytors, Clippers of Mony, Murtherers, and other Felons within the Lordships Marchers of Wales, so indicted in the adjoining Countries by the same Statute, but not against such Offenders within the Principality of Wales, which was not Lordships Marchers.

v b v

3. Some

it been part of England then made, all Laws made, or to be made in England, without naming Wales, had extended to it, which they did not before 27 H. 8.

The Incorporation of Wales with England by that Act, consists in these particulars generally.

1. That all persons in Wales should enjoy all Liberties, Privileges, and Laws in England, as the natural born Subjects of England.

2. That all persons inheritable to Land, should inherit the same according to the Laws of England, thereby inheriting in Gavelkind was abrogated.

3. That Laws, and Statutes of England, and no other, should for ever be practised and executed in Wales, as they have been, and shall be in England.

And as by this Act hereafter shall be further ordained: By this Clause not only all the present Laws of England were induced into Wales, but all future Statutes of England to be made, were also for the future in like manner induced into Wales, which was more than ever was done in Ireland; though Ireland before and by Parning's Act, had the present Laws then, and Statutes of England introduced into Ireland, but not the future Laws and Statutes to be made, as in this Case was for Wales.

But this gave no Jurisdiction in general to the Courts of England over Wales more than before; nor otherwise than if a Law were made in England, That the Laws and Statutes of England now, and for the future always to be made, should be Laws in Ireland, the Courts in England would not thereby have other Jurisdiction in Ireland than they already have in any respect.

The Uniting of Wales to England, and Incorporating, doth Note, not thereby make the Laws used in England to extend to Wales, without more express words, Pl. Com. 129. B. 130. A.

By this Act it appears, That the Lordships Marchers in the Dominions of Wales, did lye between the Shires of England and the Shires of Wales, and were not in any Shire; most of which Lordships were then in the King's possession, and some in the possession of other Lords: And that divers of them are by the Act united and joyned to the County of Gloucester, others to the County of Hereford, and others to the County of Salop; others respectively to the Shires of Glamorgan, Carmarthen, Pembrook, and Merioneth.

Sid. 92.

So as since this Statute the Courts of Westminster have less Jurisdiction in Wales than before; for before they had some in all their Lordships Marchers, which were in no County, as by this Act, and since, they being all reduced into Counties, either of England or Wales, their Jurisdiction is absolute over such of them, as are annexed to English Counties, but none over the rest.

And accordingly it hath been still practised since the Statute, for before, Lordships Marchers and Quare Impedits of Churches within them were impleadable in the Kings Courts by Originals out of the Chancery, directed to the adjoining Sheriffs, and the Issue tryed in the Counties adjoining.

But since no such Original hath issued for real Actions, nor any such Tryal been.

And what hath been in personal Actions of that kind, began upon mistake, because they found some Originals issued into some part of Wales, and knew not the true reason of it, that it was by Act of Parliament, they then concluded Originals might issue for any cause arising into any part of Wales, and the Tryals to be in the adjacent Counties of England generally.

And though that practice hath been deserted since the Statute of 27 H. 8. as to real Actions, because the subject matter of the Lordships Marchers was taken away, which in some sense was lawful (as is opened) before the Statute, yet they have retained it still in personal Actions, which was never lawful, nor found in any Case anciently practised, as real Actions were, as appears in the Case of Stradling and Morgan in the Commentaries; yet that was upon a Quo minus out of the Exchequer, which I do not see how it can change the Law.

If Judgments be obtained in the King's Courts against persons inhabiting in Wales, and that Process of Execution cannot be awarded thither, the Judgments will be ineffectual. Obj. 1.

The same may be said of Judgments obtained against a Frenchman, Scotch-man or Dutch-man whose usual Residence, Lands, and Goods are in those Territories; he that sues ought to fore-see what benefit he shall have by it, and must not expect it, but where the Courts have Jurisdiction. Answ. 1.

The same may be said of Judgments obtained here against Irish-men, Garnsey or Jersey Inhabitants, or formerly against those of Calais, Gascoign, Guien, which were equally and some are still, of the Dominions of England, as Wales is subject to the Parliament of England, but not under the Jurisdiction of the Courts at Westminster, though subject to Mandatory Writs of the King.

That

2.

Wales is no Franchise, or if it were, not within the Realm; Answ. for the questions concerning a Deed pleaded, bearing date there, but of Original Process for Causes arising, and Trials of them in the next County adjoining, and not in the County where the Action of a Deed dated in a Franchise of the Realm, which do *toto caelo* differ, and concerning Executions and Judgments here to be made in another Dominion.

The same may be said concerning the Statute of 12 E. 2. when Witnesses to Deeds in Foreign Franchises are to be summoned with the Jury, and the Trial, notwithstanding their absence, to proceed when the VVrit is brought.

Presidents of Process issued to the Sheriffs of Wales, without a Obj. 4. Judicial decision upon Argument, are of no moment: Many things may be done several ways (as Bonds) though they have regularly one common form, yet they may be in other forms as well. Presidents are useful to decide questions, but in such Cases as these which depend upon fundamental Principles, from which Demonstrations may be drawn, millions of Presidents are to no purpose: Besides, it is known, that Officers grant such Process to one Sheriff or County, as they use to another, nor is it in them to distinguish between the power of the Court over a Sheriff in Wales from a Sheriff in England, especially when they find some VVrits of Execution going which are warranted by Acts of Parliament, which they know not, though they do know Process of Execution in fact runs thither, as *Capias utlagatum*, Extents upon Statute, which are by Acts of Parliament, And that other Mandatory VVrits issue thither as well at Common Law, as by a particular Clause concerning the Chancellor in the Act of 34 H. 8. c. 26.

Stat. Tract 1.
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By the Register upon a Judgment had in the Common Pleas a. Regist. f. 43 B. Brevium Ju-
gainst a Clerk, who was after made Archbishop of Dublin in dicialium.
Ireland, upon a Fieri Facias issued to execute the Judgment to the Sheriff of Middlesex, and his Return that he had no Lands or Goods in his Bayliwick, but was Archbishop in Ireland, upon a Testatum of it in the Common Pleas, that he had Lands and Goods in Ireland, a Fieri Facias issued in the King's name, Ju-
sticiario suo Hiberniae, to make Execution; but it appears not whether this VVrit issued from the Common Pleas, or especially by the King's Direction out of the Chancery, which possibly may be as a special Mandatory VVrit of the King's locum tenens there, which varies in style at the King's pleasure; anciently Ju-
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An Exact and Perfect

TABLE

TO THE

REPORTS and ARGUMENTS

OF

Sir *JOHN VAUGHAN*, Lord Chief
Justice of the Court of *Common Pleas*.

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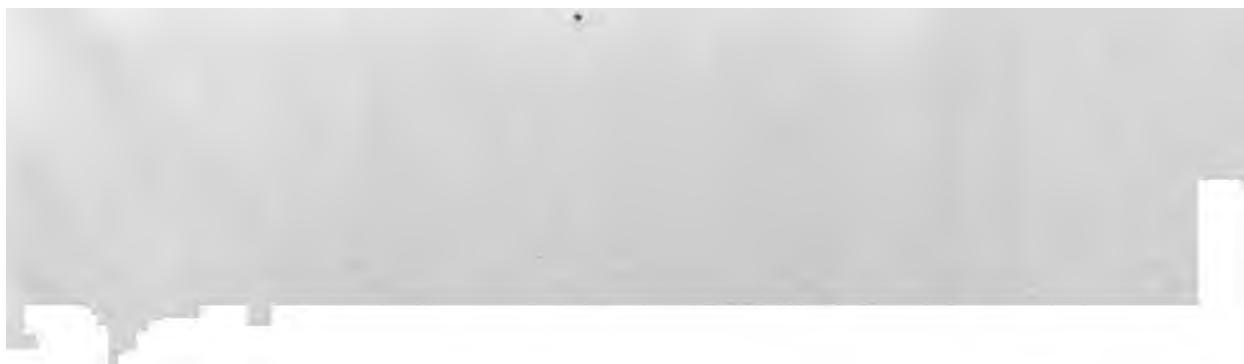
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